

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

13-14

BRIEF FOR APPELLANT
AND JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,283

208

KREEKET X-RAY CORPORATION, *Appellant*.

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
For the
District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Is the United States subject to suit under the Federal Tort Claims Act in the same manner and to the same extent as a private individual under like circumstances?

2. Is a private individual deprived of his right to contribution or indemnity in the District of Columbia in the event that the injured party fails to file a timely action against the co-tort-feasor from whom indemnity or contribution is sought?

3. Does the Tort Claims Act Statute of Limitations bar the instant cross-claim for indemnity or contribution even though said cross-claim is filed prior to two years from the date the claim for indemnity or contribution accrues?

4. Does the Tort Claims Act Statute of Limitations have a *nunc pro tunc* effect or is it merely jurisdictional so as to preclude a United States District Court from entertaining the action after two years has expired from its accrual, thereby extinguishing forever after any rights the claimant may have had?

5. Did the trial court err in dismissing appellant's cross-claim and in holding that appellant's right to indemnity or contribution from the United States of America is barred merely because the injured party chose not to make timely assertion of her claim against the United States of America?

INDEX

	Page
Jurisdictional Statement	1
Statement of Case	2
Facts	2
Proceedings below	3
Statutes and Rules Involved	4
Statement of Points	5
Summary of Argument	6
Argument	
A. The Tort Claims Act Must be Liberally Construed and Applied	7
B. The United States Is Subject to Suit for Indemnity and Contribution	9
C. Indemnity and Contribution are Firmly Established as Independent Rights in the District of Columbia	10
D. The Right to Indemnity or Contribution Accrues When There Is a Disproportionate Payment and Is Not Barred by the Statute of Limitations	13
E. The Instant Cross-Claim Is Procedurally Appropriate to Raise Claims of Indemnity or Contribution	15
F. The Only Reported Cases Applicable to the Factual Situation Presented Herein Sustain Appellant's Position	16
G. The Trial Court's Reasoning Is Not Supported by the Available Authorities	19
Conclusion	23

TABLE OF CASES

	Page
<i>Anderson v. Hayes Constr. Co.</i> , 243 N.Y. 140, 153 N.E. 28	8
<i>Bair v. Bryant</i> , 96 A. 2d 508 (D.C. Mun. App. 1953)	10, 13, 19
<i>Chicago, R.I. & P. Ry. v. United States</i> , 220 F. 2d 939 (7th Cir. 1955)	6, 9, 11, 13, 15, 16, 17, 19, 22
<i>Coates v. Potomac Electric Power Co.</i> , 96 F. Supp. 1019 (D.D.C. 1951)	12
<i>Crawford v. Pope & Talbot</i> , 206 F. 2d 784 (3d Cir. 1953)	23
<i>Damanti v. Inger</i> , 153 F. Supp. 600 (E.D. N.Y. 1957)	23
<i>D. C. Transit System, Inc. v. Slingland</i> , 266 F. 2d 465 (D.C. Cir. Apr. 17, 1959)	10, 11
<i>Drumgoole v. Virginia Electric & Power Co.</i> , 170 F. Supp. 824 (E.D. Va. 1959)	20
<i>Feres v. United States</i> , 340 U.S. 135 (1950)	8, 9, 21
<i>Foot v. Public Housing Com'n.</i> , 107 F. Supp. 270 (W.D. Mich. 1952)	23
<i>Frommeyer v. L. & R. Constr. Co.</i> , 139 F. Supp. 579 (D.N.J. 1956)	16
<i>George's Radio Inc. v. Capital Transit Co.</i> , 75 U.S. App. D.C. 187, 126 F. 2d 219 (1942)	10
<i>Henry Fuel Co. v. Whitebread</i> , 99 U.S. App. D.C. 9, 236 F. 2d 742 (1956)	6, 10, 11, 12, 18, 19, 20, 24
<i>Hidick v. Orion Shipping & Trading Co.</i> , 157 F. Supp. 477 (S.D. N.Y. 1957)	13, 14, 15, 16, 18, 22
<i>Jacobsen v. United States</i> , 160 F. Supp. 491 (E.D. Pa. 1957)	21
<i>James McWilliams Blue Line, Inc. v. Esso Standard Oil Co.</i> , 123 F. Supp. 824 (S.D. N.Y. 1954)	14
<i>Knell v. Feltman</i> , 85 U.S. App. D.C. 22, 174 F. 2d 662 (1949)	10, 11, 19, 20
<i>Lomax v. United States</i> , 155 F. Supp. 354 (E.D. Pa. 1957)	21
<i>Mangone v. Moore-McCormack Lines, Inc.</i> , 152 F. Supp. 848 (E.D. N.Y. 1957)	23
<i>McKenna v. Austin</i> , 77 U.S. App. D.C. 228, 134 F. 2d 659 (1943)	10, 19
<i>Northwest Airlines Inc. v. Glenn L. Martin Co.</i> , 161 F. Supp. 452 (D. Md. 1958)	14
<i>Patterson v. Pennsylvania R.R.</i> , 197 F. 2d 252 (2d Cir. 1952)	10, 11, 22

	Page
<i>Pennsylvania R.R. v. McAllister Bros., Inc.</i> , 137 F. Supp. 788 (S.D. N.Y. 1956), <i>aff'd</i> , 240 F.2d 423 (2d Cir. 1957)	23
<i>Rushford v. United States</i> , 204 F.2d 831 (2d Cir. 1953) ..	22
<i>Sabat v. Pennsylvania R.R.</i> , 157 F. Supp. 325 (E.D. N.Y. 1958)	7, 14, 15, 16, 17, 19, 22
<i>St. Louis-San Francisco Ry. v. United States</i> , 187 F.2d 925 (5th Cir. 1951)	9, 11, 23
<i>Simon v. United States</i> , 244 F.2d 703 (5th Cir. 1957) ..	21
<i>Southern Pac. Co. v. Raish</i> , 205 F.2d 389 (9th Cir. 1953)	22
<i>State ex rel. Burkhardt v. United States</i> , 165 F.2d 869 (4th Cir. 1947)	23
<i>Thomas v. Malco Refineries Inc.</i> , 214 F.2d 884 (10th Cir. 1954)	10
<i>United States v. Aetna Sur. Co.</i> , 338 U.S. 366 (1949) ..	8, 9
<i>United States v. Capital Transit Co.</i> , 108 F. Supp. 348 (D.D.C. 1952)	9, 22
<i>United States v. First Sec. Bank of Utah</i> , 208 F.2d 424 (10th Cir. 1953)	22
<i>United States v. Shainfine</i> , 151 F. Supp. 586 (E.D. Pa. 1957)	22
<i>United States v. Yellow Cab Co.</i> , 340 U.S. 543 (1951) ..	8, 9, 15, 21
<i>United States v. Wilkes-Barre Transit Corp.</i> , 143 F. Supp. 413 (M.D. Pa. 1956)	22
<i>Vickers Petroleum Co. v. Biffle</i> , 239 F.2d 602 (10th Cir. 1956)	10
<i>Washington Gas Light Co. v. District of Columbia</i> , 161 U.S. 316 (1896)	12
<i>Wojciuk v. United States</i> , 74 F. Supp. 914 (E.D. Wis. 1947)	9
<i>Yellow Cab Co. v. Dreslin</i> , 86 U.S. App. D.C. 327, 181 F.2d 626 (1950)	20
<i>Young v. United States</i> , 87 U.S. App. D.C. 145, 184 F.2d 587 (1950)	23

STATUTES, RULES AND TREATISES

Act of June 25, 1948, ch. 646, 62 Stat. 983, U.S.C.A., Title 28 § 2674	5, 7, 9
Act of June 25, 1948, ch. 646, 62 Stat. 971, U.S.C.A., Title 28 § 2401	4, 13, 14, 15, 21, 22

	Page
Federal Rules of Civil Procedure, Rule 13(g)	5, 14
Gregory, <i>Contribution Among Tort-Feasors; A Uniform Practice</i> , 1938 Wis. L. Rev. 365	11
1 HARPER & JAMES, TORTS (1956)	11
Annot., <i>Running of statute of limitations against claim for contribution or indemnity based on tort</i> , 20 A.L.R. 2d 925 (1951)	14
3 MOORE, FEDERAL PRACTICE (2d Ed. 1948)	
§ 13.29	22
§ 13.34	14
§ 13.36	16
RESTATEMENT, TORTS, § 885 (1939)	22

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v.

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Appeal from the United States District Court for the
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction pursuant to the provisions of Title 11-305, 306, District of Columbia Code, 1951 Edition; 60 Stat. 842, et seq.; 28 U.S.C., § 2674; and Rule 13(g), Federal Rules of Civil Procedure.

In the United States District Court a complaint (J.A. 1-4), subsequently amended (J.A. 4-7), was filed

against the United States of America and Keleket X-Ray Corporation. A cross-claim was filed pursuant to the provisions of Rule 13, Federal Rules of Civil Procedure (J.A. 9-10). A final judgment dismissing the cross-claim was entered on May 25, 1959 (J.A. 16-22). Notice of Appeal was filed June 23, 1959 (J.A. 25). This Court has jurisdiction pursuant to the provisions of Title 28, § 1291 and § 1294.

STATEMENT OF CASE

Facts:

On April 27, 1956 Gertrude Slater, while a patient at Freedmen's Hospital, was injured when an X-ray machine being operated by an employee of the United States of America fell upon her wrist. (J.A. 2) The injuries allegedly sustained were the result of the primary negligence of the employees of the United States. At the very least, such negligence was a contributing cause.

According to the allegations of her complaint, Gertrude Slater was a paid patient at Freedmen's Hospital, "whose treatment required X-ray pictures of her body. . . ." She charged that the employees at the hospital disregarded their duty towards her; failed to make a reasonable inspection of the cable before using the X-ray machine; and used the machine while it was in a defective condition "thereby causing said cable to break and causing the tube head to fall on the plaintiff's wrist with great force." (J.A. 3)

The evidence with which the trial court was confronted demonstrated that the machine involved had been installed by Keleket X-Ray Corporation in 1953 and that it had been operating properly and uneventfully until approximately 4:00 p.m. on the day before the accident. At that time the cable supporting the head was discovered to bind as the head was being raised or lowered and upon their inspection Freedmen's Hospital (United States) employees

found a ravel in the wire. Notwithstanding this notice they continued to permit the machine to be operated and to be used upon the plaintiff so that prior to 10.30 a.m. on the following day the accident occurred. (J.A. 12)

Plaintiff claimed that Keleket X-Ray Corporation installed the machine and that Keleket had a contract with Freedmen's Hospital to keep the equipment in reasonable repair and plaintiff concluded that Keleket was negligent in the manufacture of the cable and in the maintenance of the equipment. (J.A. 4-5) Keleket admitted installation of the machine in 1953; admitted the existence of a service contract; denied that the contract imposed the obligations plaintiff claimed; denied negligence and breach of duty to plaintiff and cross-claimed against the United States. In its cross-claim Keleket asserted that if plaintiff was injured in the manner alleged and for the reason specified in the Amended Complaint, and if the plaintiff should become entitled to receive any sum against it, the liability imposed would be the result of the primary or contributory negligence of the United States and that the United States, therefore, may be liable over to Keleket for indemnity or contribution. (J.A. 9-10)

Proceedings Below:

The accident occurred April 27, 1956. The original complaint was filed February 4, 1958. (J.A. 1-4) By letter dated March 12, 1958, Keleket sought permission of the United States Attorney's office to interview the employees of Freedmen's Hospital so that it could determine whether a cross-claim should be prepared. Keleket was asked to withhold action pending the decision of the United States Attorney's office.¹ The motion to dismiss based upon the contention that the Department of Health, Education and

¹ It received no reply until January 22, 1959, at which time its request was rejected and immediately thereafter the oral depositions of the United States' employees were scheduled and they were taken on February 14, 1959. (J.A. 8, 12)

Welfare and Freedmen's Hospital were instrumentalities of the United States which cannot be sued by name was filed April 7, 1958. (J.A. 23) On May 17, 1958, plaintiff filed her amended complaint. (J.A. 4-7) Subsequently the United States withdrew its first motion to dismiss and responded to the complaint raising in its answer the defense of the Statute of Limitations. (J.A. 23) On January 30, 1959 the United States filed its motion for judgment on the pleadings or in the alternative to dismiss on the ground that the suit was barred by the Statute of Limitations. (J.A. 24) On February 25, 1959 Keleket filed its answer to the amended complaint and its cross-claim for indemnity or contribution. (J.A. 9-10) The United States filed its Motion To Dismiss Cross-Claim on April 23, 1959. (J.A. 10-11) Judge Alexander Holtzoff heard oral argument on May 7, 1959, took the matter under advisement, and permitted the filing of Supplemental Points and Authorities. (J.A. 24) On May 12, 1959 Judge Holtzoff filed his memorandum opinion and the order of final judgment dismissing the cross-claim pursuant to Rule 54 (b), Federal Rules of Civil Procedure was entered on May 25, 1959. (J.A. 16-22) This appeal followed. (J.A. 25)

STATUTES AND RULES INVOLVED

Act of June 25, 1948, ch. 646, 62 Stat. 971, U.S.C.A., Title 28, § 2401, as amended, April 25, 1949, ch. 92, § 1, 63 Stat. 62:

§ 2401. Time for commencing action against United States.

.

(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. . . .

Act of June 25, 1948, ch. 646, 62 Stat. 983, U.S.C.A., Title 28, § 2674:

§ 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Federal Rules of Civil Procedure, Rule 13(g):

(g) Cross-claim Against Co-Party. A Pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or a part of a claim asserted in the action against the cross-claimant.

STATEMENT OF POINTS

1. Did the trial court err in dismissing appellant's cross-claim and in holding that appellant's right to indemnity or contribution from the United States of America is barred merely because the injured party chose not to make timely assertion of her claim against the United States of America?

2. The trial court erred in holding that appellant's cross-claim did not state a cause of action for indemnity or contribution.

3. The trial court erred in holding that appellant's cross-claim for indemnity or contribution was barred by the Federal Tort Claims Act Statute of Limitations.

SUMMARY OF ARGUMENT

The trial court dismissed appellant's cross-claim against the United States for the reason that the injured party failed to properly sue the United States within a two-year period after the accident of which she complains. This action was taken upon the Government's motion to dismiss in which the United States took the position that the statute of limitations had run against the cross-claim for indemnity or contribution. In that contention it is admittedly wrong. The motion of the United States did not raise the argument that there was an absence of the common obligation which would be required as a proper basis for a claim of contribution. The trial court's action was taken on the basis of the record which had been compiled in the action and its efficacy must be examined in the light of all facts most favorably construed in favor of the cross-claimant.

The Federal Tort Claims Act has been erroneously interpreted and the established law of the District of Columbia on the subjects of indemnity and contribution has been disregarded. The cross-claim was properly asserted and should be allowed because (1) Congress has manifested its intention to subject the United States to suit in the same manner and to the same extent as a private individual; (2) a private individual in the District of Columbia is subject to suit for indemnity or contribution under the factual circumstances here presented; *Henry Fuel Co. v. Whitebread*, 99 U.S. App. D.C. 9, 236 F.2d 742 (1956); (3) the United States is subject to suits for indemnity or contribution either by separate action, third-party complaint or cross-claim; (4) the statute of limitations has not run against the cross-claim; (5) the cross-claim states a claim independent from that of the plaintiff and did not fall when the complaint against the United States was dismissed; and because (6) the reported cases establish its validity. *Chicago, R. I. & P. Ry. v.*

United States, 220 F.2d 939 (7th Cir. 1955); *Sabat v. Pennsylvania R.R.*, 157 F. Supp. 325 (E.D.N.Y. 1958).

The trial court's judgment of dismissal must be reversed because it deprives appellant of a substantive right which this Court has unalterably established and which is consistent with the pronouncements of the Supreme Court of the United States and with "equity and good conscience." There is no justification for the dismissal of the cross-claim in reason, logic or reported cases.

ARGUMENT

In this case the trial court dismissed a cross-claim against the United States. The same cross-claim would have been perfectly valid against an individual or corporation under the law of the District of Columbia.

The trial court's action stems from a complete disregard of the nature of the Federal Tort Claims Act and from misconceptions of the status of the law of indemnity and contribution as it exists in the District of Columbia. Congress has provided that the United States ". . . shall be liable respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, . . ."² One must look to the intent and purpose of Congress in the enactment of the Tort Claims Act and one must ascertain, by reference to the District of Columbia law, the nature and extent of the rights to indemnity and contribution which are here involved.

A. The Tort Claims Act Must be Liberally Construed and Applied

That "The King can do no wrong" was an outmoded, tarnished concept long before the enactment of the Federal Tort Claims Act would be readily conceded by any United

² Title 28, U.S.C. § 2674.

States Congressman who served prior to 1948. The United States by means of private acts in Congress, had for many years attempted to compensate those who were wronged by virtue of the negligence of employees of the United States but who had no remedy because the doctrine of sovereign immunity from suit closed the doors of the courts to them and left them with claims and no forum in which to enforce them. It is clear that Congress intended to transfer the burden of examining tort claims to the courts and to remove the rigorous harshness of immunity from suit by extending a remedy to those who had previously been without. The manifest intention was to provide a forum for those who possessed causes of action which would be actionable if the sovereign would consent to be sued. *Feres v. United States*, 340 U.S. 135 (1950). These principles have been unalterably established.

The Supreme Court of the United States in *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951), said at pp. 548-49:

This Act does not subject the Government to a previously unrecognized type of obligation This Act merely substitutes the District Courts for Congress as the agency to determine the validity and amounts of the claims.

And rejecting a technical approach of narrow construction in the same opinion, the Court quoting from an earlier opinion of Judge Cardozo³ said at page 554:

No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy.

Again quoting from Judge Cardozo,⁴ the Supreme Court in *United States v. Aetna Sur. Co.*, 338 U.S. 366 (1949), said at page 383:

³ *Anderson v. Hayes Constr. Co.*, 243 N.Y. 140, 153 N.E. 28.

⁴ *Ibid.*

The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.

In *Feres v. United States, supra*, the Supreme Court held the Tort Claims Act to be remedial and subject to liberal construction, stating at pages 139-140 that the Act contemplated:

. . . wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government. . . . Congress . . . waived immunity and transferred the burden of examining tort claims to the courts. The primary purpose of the Act was to extend a remedy to those who had been without

United States v. Yellow Cab Co., supra; Feres v. United States, supra; United States v. Aetna Sur. Co., supra; St. Louis-San Francisco Ry. v. United States, 187 F.2d 925 (5th Cir. 1951); *United States v. Capital Transit Co.*, 108 F. Supp. 348 (D.D.C. 1952); *Wojciuk v. United States*, 74 F. Supp. 914 (E.D. Wis. 1947).

B. The United States Is Subject to Suit for Indemnity and Contribution

The United States is subject to suit "in the same manner and to the same extent as a private individual. . . ." Title 28 U.S.C. § 2674. *United States v. Aetna Sur. Co., supra; St. Louis-San Francisco Ry. v. United States, supra; and Wojciuk v. United States, supra*. If a private individual in the District of Columbia would be required to respond to the claim herein asserted the United States must also be required to respond. Clearly if the local law recognizes a cause of action for indemnity or contribution under the circumstances which are presented in the instant action, the United States is subject to suit. *United States v. Yellow Cab Co., supra; Chicago, R. I. & P. Ry.*

v. *United States*, *supra*; *Patterson v. Pennsylvania R.R.*, 197 F.2d 252 (2d Cir. 1952).

C. Indemnity and Contribution are Firmly Established as Independent Rights in the District of Columbia

By virtue of a number of decided cases, the right of one unintentional tort-feasor to contribution from another unintentional tort-feasor is clearly established in this jurisdiction. *George's Radio Inc. v. Capital Transit Co.*, 75 U.S. App. D.C. 187, 126 F.2d 219 (1942); *McKenna v. Austin*, 77 U.S. App. D.C. 228, 134 F.2d 659 (1943); *Knell v. Feltman*, 85 U.S. App. D.C. 22, 174 F.2d 662 (1949); *Henry Fuel Co. v. Whitebread*, *supra*; *D. C. Transit System, Inc. v. Slingland*, 266 F.2d 465 (D.C. Cir. Apr. 17, 1959); and *Bair v. Bryant*, 96 A.2d 508 (D.C. Mun. App. 1953).

The right is not premised upon the fact that the injured person has obtained a joint judgment or even that he may. Rather contribution in the District of Columbia is based upon "legal intendment"⁵ that where two or more concur to cause a loss, one of them in equity and good conscience should not be required to bear the loss alone. Therefore, "without reservation or exception"⁶ the one unintentional tort-feasor is given a right against the others which he may enforce by separate action, third-party action or cross-claim. *Henry Fuel Co. v. Whitebread*, *supra*; *Knell v. Feltman*, *supra*; *McKenna v. Austin*, *supra*; see, *Vickers Petroleum Co. v. Biffle*, 239 F.2d 602 (10th Cir. 1956); *Thomas v. Malco Refineries Inc.*, 214 F.2d 884 (10th Cir. 1954).

Because contribution arises by "legal intendment"⁷ and may be enforced, it is a separate and not a derivative right.

⁵ 75 U.S. App. D.C. 187 at 189.

⁶ 99 U.S. App. D.C. 9 at 13.

⁷ 75 U.S. App. D.C. 187 at 189.

It does not depend upon anything that the injured party ~~might do.~~ It can be asserted without regard to whether the injured person chooses to assert a claim against the person from whom contribution is sought and cannot be affected by his whim, caprice or inadvertence. *Henry Fuel Co. v. Whitebread, supra; Knell v. Feltman, supra; Chicago, R. I. & P. Ry. v. United States, supra; Patterson v. Pennsylvania Ry., supra; and St. Louis-San Francisco Ry. v. United States, supra.*

Of course, the right of one tort-feasor to contribution from another requires that they must have been common obligors, otherwise there is no legal intendment or equitable need for sharing the loss equally. Common liability or common obligation is to be ascertained, however "... immediately after the acts of the tort-feasors which give rise to the cause of action against them." 1 HARPER & JAMES, TORTS, p. 718 (1956). <The common obligation which is essential to the right of one to contribution is the showing that the fellow tort-feasor at some time was liable with him for damage.> Gregory, *Contribution Among Tort-Feasors; A Uniform Practice*, 1938 Wis. L. Rev. 365, 372. It is not necessary that the fellow tort-feasor continue to be liable because the contingent right to contribution exists in an inchoate form as soon as the tort occurs and only the accrual and the opportunity to exercise the right must await the payment by one or the other of a disproportionate share. When that happens the tort-feasor who has been forced to pay is then entitled "in equity and good conscience"⁸ to obtain contribution from the other whose negligence helped to bring about the loss. The mere fact that subsequent events over which he has no control change the relationship of the parties, has no significance insofar as his right to equality of treatment is concerned.

⁸ *D.C. Transit System, Inc. v. Slingland*, 266 F. 2d 465 at 470.

Recently this Court ruled decisively on this very problem in *Henry Fuel Co. v. Whitebread*, 99 U.S. App. D.C. 9, 236 F.2d 742 (1956). In that case the injured party was a passenger in the automobile driven by Dr. Whitebread and did not sue him. She gave Dr. Whitebread a release in exchange for the payment of Five Hundred Dollars and then brought suit for Thirty Thousand Dollars against the Henry Fuel Company. The Fuel Company impleaded Dr. Whitebread asserting its claimed right to contribution. Upon motion to dismiss based upon the release, the trial court entered judgment of dismissal of the third-party complaint. The authorities are unanimous that a release extinguishes the right of action and Dr. Whitebread argued that the common liability necessary to sustain contribution was lacking. This Court unhesitatingly rejected that view holding that the plaintiff's claim and the claim for contribution are rights that accrue differently and are separately asserted, even though they both stem from the same occurrence and depend upon common facts. The Court held further that the right to contribution exists without exception or reservation and cannot depend upon the plaintiff's selection of defendants or upon his caprice or whim. The fact that the plaintiff had extinguished her cause of action against Dr. Whitebread was held not to adversely affect the contribution to which Henry Fuel Company acquired a contingent right upon the happening of the collision.

The right to indemnity, when the facts warrant, is also firmly established in the District of Columbia. *Washington Gas Light Co. v. District of Columbia*, 161 U.S. 316 (1896); *Coates v. Potomac Electric Power Co.*, 96 F. Supp. 1019 (D.D.C. 1951). It may exist against (1) one whose primary and active negligence was the true proximate cause of the accident; (2) one who was in a better position to have prevented the accident and failed to act; or (3) against one who contracted, either expressly or by implication, to be liable. It may, but does not necessarily, involve a

common obligation. *Hidick v. Orion Shipping & Trading Co.*, 157 F. Supp. 477 (S.D.N.Y. 1957). Appellant's cross-claim states a cause of action in indemnity as well as in contribution when it charges the United States in hypothetical form with negligence and carelessness in bringing about the accident and specifically with failure to employ suitable measures to avoid it. Evidence, of course, was not pleaded. However, if appellant is able to adduce evidence which would support the pleaded allegations it is entitled to exoneration from the United States by reason of the breach by Government employees of a duty owed by the United States to Keleket X-Ray Corporation. This claim was not properly subject to summary dismissal.

D. The Right to Indemnity or Contribution Accrues When There Is a Disproportionate Payment and Is Not Barred by the Statute of Limitations

Assuming the existence of the right, one must then consult the Tort Claims Act to ascertain the time requirement for the institution of the action. Section 2401 provides that "A tort claim . . . shall be forever barred unless action is begun within two years after *such* claim accrues. . . ." (Emphasis supplied.) Congress did not provide that such claim shall be barred unless action is begun within two years after the happening of the accident or after the tort occurs. This language was available if it had been the intent of Congress to provide no legal action could be commenced at a time more remote than two years from the occurrence which must be investigated. The language ". . . within two years after such claim accrues" was purposeful and must be given its literal meaning. When does the claim for indemnity or contribution accrue? The authorities are unanimous that the claim accrues and the statute of limitations begins to run at the time of disproportionate payment. *Bair v. Bryant*, 96 A.2d 508 (D.C. Mun. App. 1953); *Chicago, R. I. & P. Ry. v. United States*, 220 F.2d

939 (7th Cir. 1955); *Hidick v. Orion Shipping & Trading Co.*, 157 F. Supp. 477 (S.D.N.Y. 1957); *James McWilliams Blue Line, Inc. v. Esso Standard Oil Co.*, 123 F. Supp. 824 (S.D.N.Y. 1954); *Northwest Airlines Inc. v. Glenn L. Martin Co.*, 161 F. Supp. 452 (D. Md. 1958); *Sabat v. Pennsylvania R.R.*, 157 F. Supp. 325 (E.D.N.Y. 1958); Annot., *Running of statute of limitations against claim for contribution or indemnity based on tort*, 20 ALR2d 925 (1951).

In *Northwest Airlines, supra*, the court said at 161 F. Supp. 458:

That the right of action for indemnity arises at and limitations begin to run from, the time of payment or settlement by the one secondarily liable, and the right of contribution arises at, and limitations begin to run from, the time of payment in excess of plaintiff's proportionate share, is consonant with generally recognized authority.

In *Sabat, supra*, the court said at 157 F. Supp. 327:

Since the occasion for seeking indemnity will not arise until the primary liability of the defendant has been established, it would seem clear that the limitation period established in Title 28 U.S.C. § 2401 is not a bar to the third-party complaint, since the occasion for it to seek indemnity has not thus far arisen.

It is by virtue of the pleading liberality sanctioned by the Federal Rules of Civil Procedure that claims for contribution or indemnity may be asserted even before they accrue in certain instances. Rule 13(g), Federal Rules of Civil Procedure, under which the instant cross-claim was filed, by its terms permits the filing of "... a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or a part of a claim asserted in the action against the cross-claimant." This provision according to Professor Moore has the effect of accelerating the accrual of the right in the interest of avoiding

multiplicity of actions. 3 MOORE, FEDERAL PRACTICE, § 13.34, p. 93 (2d Ed. 1948).

Any view to the effect that the statute of limitations bars the instant cross-claim must fly directly in the face (1) of the Tort Claims Act itself,⁹ which provides that the time is to begin to run when the claim *accrues* and (2) of a striking unanimity in the reported cases to the effect that § 2401 does not bar claims for indemnity or contribution which are filed within two years of payment, but more than two years after the accident. *Chicago, R. I. & P. Ry. v. United States*, 220 F.2d 939 (7th Cir. 1955); *Sabat v. Pennsylvania R.R.*, 157 F. Supp. 325 (E.D.N.Y. 1958). See, *Hidick v. Orion Shipping & Trading Co.*, 157 F. Supp. 477 (S.D.N.Y. 1957). In no reported case has it been held that a claim for indemnity or contribution filed within two years of payment was barred by virtue of the limitations of Section 2401.

E. The Instant Cross-Claim Is Procedurally Appropriate to Raise Claims of Indemnity or Contribution

The Supreme Court of the United States in *United States v. Yellow Cab*, 340 U.S. 543 (1951), made it clear that claims of contribution and indemnity may be raised against the United States under the Tort Claims Act by way of cross-claim or third-party action, saying at 551-2, 554:

Of course there is no immunity from suit *by* the Government to collect claims for contribution due it from its joint tort-feasors. The Government should be able to enforce this right in a federal court not only in a separate action but by impleading the joint tort-feasor as a third-party defendant. See 3 Moore's Federal Practice (2d ed. 1948) 507, *et. seq.* It is fair that this should work both ways.

* * * * *

⁹ 28 U.S.C.A. § 2401.

Once we have concluded that the Federal Tort Claims Act covers an action for contribution due a tort-feasor, we should not, by refinement of construction, limit that consent to cases where the procedure is by separate action and deny it where the same relief is sought in a third party action. . . . "No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy."

Dismissal of the complaint does not affect the cross-claim. It may stand by itself and be litigated if it has an independent basis for jurisdiction. *Frommeyer v. L & R Constr. Co.*, 139 F. Supp. 579 (D.N.J. 1956); 3 MOORE, FEDERAL PRACTICE, § 13.36 (2d Ed. 1948).

In *Frommeyer, supra*, the court said at 586:

There can be no doubt that had American not been a co-party at the time the cross-claims were made it could have been made a third-party defendant under Rule 14. But because it was a co-party of Wortmann and Seaboard at the time, the cross-claims were proper. Once proper, they did not cease to be so because the party to whom they were addressed subsequently ceased to be a co-party. This result is clearly contemplated by the language of Rule 13(g).

F. The Only Reported Cases Applicable to the Factual Situation Presented Herein Sustain Appellant's Position

There are only two reported cases under the Federal Tort Claims Act which involve claims for indemnity or contribution which were brought more than two years after the accident occurred, but less than two years after payment was made and wherein there was no substantive impediment to the injured person's claim against the United States at the time of the accident. *Chicago, R. I. & P. Ry. v. United States*, 220 F.2d 939 (7th Cir. 1955), and *Sabat v. Pennsylvania R.R.*, 157 F. Supp. 325 (E.D.N.Y. 1958). There is a similar problem presented under the Suits in Admiralty Act in *Hidick v. Orion Shipping & Trading Co.*, 157 F. Supp. 477 (S.D.N.Y. 1957).

In *Chicago, Rock Island, supra*, the accident occurred in 1946. The Railroad made informal demand upon the United States to take over the defense of claims and was rejected. It then proceeded to settle the claims and filed suit for indemnification against the United States. The Government's defense of limitations was based upon the fact that the suit for indemnity was instituted four and one-half years after the accident even though within two years of the earliest settlement payment. The trial court entered judgment in favor of the plaintiff Railroad, and the United States appealed. The Court of Appeals reviewed the law establishing that the United States is subject to suit for indemnity and contribution saying at 940:

... there appears to be no logical basis to make a distinction between the right of a joint tort-feasor to recover in part and the right of an indemnitee to recover all.

On the statute of limitations argument, the court said, at 942:

The Government's contention on this point, if sustained, would mean that a suit under the Tort Claims Act could be barred before it came into existence. Such an application of the limitation provision would produce an incongruity which we think should not be made.

In *Sabat, supra*, the United States moved to dismiss the third-party complaint on the ground that the statute of limitations had run. The accident involved occurred in 1952. The injured person sued the railroad in 1954, but the third-party complaint was not filed until 1957. The court denied the motion to dismiss and said at 327:

Since the occasion for seeking indemnity will not arise until the primary liability of the defendant has been established, it would seem clear that the limitation period established in Title 28 U.S.C. § 2401 is not a bar

to the third-party complaint, since the occasion for it to seek indemnity has not thus far arisen.

In *Hidick* there is a detailed discussion of the problem.¹⁰ That case involved the Suits in Admiralty Act. The owner of a vessel chartered by the United States settled with some claimants and paid judgments with respect to others before filing, in a pending action, a third-party complaint against the Government. The statute involved, as does the Tort Claims Act, required that suits "... shall be brought within two years after the cause of action arises." The Government's motion to dismiss was based upon the statute of limitations. The accident occurred in August 1953, the complaint was filed in November 1956 and the third party complaint was filed in March 1957. Both complaint and third-party complaint were filed more than two years after the accident occurred. The motion to dismiss was denied. The court said at 489:

It would be both inequitable and illogical to hold that Pacific's cause of action against the Government for indemnification accrued before Pacific's own loss had been fixed by judgment in favor of the injured seamen or by settlement with them.

* * * * *

and at 485:

Obviously the two-year time limitation could not begin to run before the cause of action accrued.

The cases in the District of Columbia also sustain appellant's position which is that (1) its cause of action for indemnity or contribution is independent and separate so that the injured person is unable to adversely affect it by his actions and (2) the claim accrues and the statute of limitations runs from the date of payment and not from the date of the accident. *Henry Fuel Company v. Whitebread*, 99 U.S. App. D.C. 9, 236 F.2d 742 (1956);

¹⁰ 157 F. Supp. 487-489.

Knell v. Feltman, 85 U.S. App. D.C. 22, 174 F.2d 662 (1949); *McKenna v. Austin*, 77 U.S. App. D.C. 228, 134 F.2d 659 (1943); *Bair v. Bryant*, 96 A.2d 508 (D.C. Mun. App. 1953).

The release in *Henry Fuel, supra*, fully extinguished any rights that the injured person had against Dr. Whitebread. The third-party complaint was filed thereafter and this Court rejected the contention that contribution would not lie because there was no common liability holding that there had been common obligation and that the right of contribution existed independent of the plaintiff's claim "without exception or reservation" to the extent that it could not be affected by the plaintiff's selection of defendants and even survived the extinguishment of plaintiff's right of action against one of them.

This Court in *Knell, supra*, similarly rejected an analogous contention saying at 85 U.S. App. D.C. at 25:

For these reasons, we see no substance in the suggestion that contribution between concurrent tortfeasors can be enforced only if both are judgment debtors of the plaintiff.

Despite these pronouncements, the trial court in effect¹¹ has held that since the plaintiff in filing suit made an improper designation and thereby sued the wrong party so there can be no judgment in favor of the plaintiff against the United States, it follows that the right of Keleket to contribution is also barred because there can be no common judgment. This holding must be reversed.

G. The Trial Court's Reasoning Is Not Supported by the Available Authorities

The trial court's theory is based upon the following premises: (1) a private person would not be subject to suit for indemnity or contribution under the circumstances

¹¹ This is so because it is clear that the statute of limitations does not bar appellant's claims herein. *Bair v. Bryant, supra*; *Chicago, E.I. & P. Ry. v. United States, supra*; *Sabat v. Pennsylvania E.E., supra*.

presented; (2) in the District of Columbia contribution only arises against a tort-feasor jointly liable; (3) there is no joint liability because the injured person permitted the statute of limitations to bar her claim; (4) the Tort Claims Act Statute of Limitations is substantive and extinguishes the right *nunc pro tunc*; and, therefore, (5) the statute of limitations bars the cross-claim for indemnity or contribution.

First the trial court applied a strict construction to the Tort Claims Act even while expressing in the opinion the well-established principle that a liberal construction must be given. Next, the trial court said that a private person would not be subject to a claim for indemnity or contribution under these circumstances in the District of Columbia and cites *Yellow Cab Co. v. Dreslin*, 86 U.S. App. D.C. 327, 181 F.2d 626 (1950). Reliance on *Dreslin* is misplaced and disregards *Knell v. Feltman*, *supra*, and *Henry Fuel Co. v. Whitebread*, *supra*, which are dispositive. In *Dreslin* this Court merely held that the public policy which precludes a wife from suing her husband is sufficient to bar an action against him for indemnity or contribution which is based upon injuries which were allegedly sustained by his wife. In the circumstances there presented this Court clearly held that there never was a common obligation and stated at page 328 that "An injured party plaintiff in the suit from which a right of contribution develops must have had a cause of action against the party from whom contribution is sought." The *Dreslin* decision is consistent with that of Judge Bryan in *Drumgoole v. Virginia Electric & Power Co.*, 170 F. Supp. 824 (E.D.Va. 1959). In the *Drumgoole* case, Vepco's attempt to implead the United States for indemnity or contribution was denied because the injured party was a soldier who was injured in the line of duty and, therefore, precluded from recovery against the United States, so that the United States never had a common obligation with Vepco. Neither the *Dreslin* nor the *Drumgoole* case

supports the trial court's conclusion herein that the instant claim for indemnity or contribution is to be denied appellant because the injured party inadvertently permitted the statute of limitations on her claim to expire.

The decisions on statute of limitations questions arising under the Tort Claims Act seem to attribute to § 2401 a more substantive effect than is to be given other statutes of limitations. *Lomax v. United States*, 155 F. Supp. 354 (E.D. Pa. 1957); *Jacobsen v. United States*, 160 F. Supp. 491 (E.D. Pa. 1958); *Simon v. United States*, 244 F.2d 703 (5th Cir. 1957). It is appellant's belief that the obiter dictum in those cases is inaccurate. However, they are not particularly important to the decision of the instant appeal and for that reason will be treated only briefly. *Lomax v. United States*, *supra*, decides that § 2401 is jurisdictional and that no new parties may be added after its limitation and then proceeds to discuss the fact that the Tort Claims Act created a substantive right previously non-existent and concludes that, therefore, compliance with the time limitation is essential to the creation of the cause of action. These comments, being unnecessary to decision, are mere dicta. They are also erroneous. The Supreme Court of the United States in *Feres v. United States*, 340 U.S. 135 (1950), and *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951), stated unequivocally that the Tort Claims Act did not create any new causes of action. It merely waived an immunity which previously had protected the United States from causes of action and extended a legal remedy to those who had been without by substituting the District Courts of the United States for Congress as the agency to determine the validity of claims. In setting up this procedure for the processing of claims which arose by virtue of negligence of employees of the United States, a time limit was prescribed beyond which the District Courts were given no jurisdiction.¹²

¹² It is important to note that the time limit prescribed was two years from the date when the claim accrues and has no reference to the date of the accident or occurrence.

Section 2401 is probably jurisdictional and there is no facile way in which a tort claim can be enforced against the Government after two years has expired from the date on which such claim arose.¹³ This does not mean that no common obligation ever existed and there is no justification for the trial court giving to Section 2401 a *nunc pro tunc* effect. The extinguishment of a plaintiff's right to sue the Government has no greater effect than the extinguishment of the rights of one who has executed a release. *United States v. First Sec. Bank of Utah*, 208 F.2d 424, 428 (10th Cir. 1953); *Southern Pac. Co. v. Raish*, 205 F.2d 389 (9th Cir. 1953); *Rushford v. United States*, 204 F.2d 831 (2d Cir. 1953); RESTATEMENT, TORTS, § 885 (1939). It is clear in the District of Columbia that such extinguishment does not adversely affect one tort-feasor's right to contribution from another. *Henry Fuel Co. v. Whitebread*, 99 U.S. App. D.C. 9, 236 F.2d 742 (1956).

There is no logical support for the trial court's conclusion that Keleket cannot sue the United States because Gertrude Slater did not. And there is no support for the finding that there was no common obligation because the plaintiff did not properly assert an action against the United States. If it were so that the United States never had a common obligation with another tort-feasor unless the United States had been sued directly by the injured person, then all the cases of indemnity and contribution wherein the United States was a third-party defendant rather than a defendant must have been improperly decided. *Chicago, R. I. & P. Ry. v. United States*, *supra*; *Hidick v. Orion Shipping & Trading Co.*, *supra*; *Patterson v. Pennsylvania R.R.*, *supra*; *Sabat v. Pennsylvania R.R.*,

¹³ It has been held that the United States may waive the time limitation of Section 2401 by instituting an action against one who may have had a claim against it after the two year statute of limitations has expired. *United States v. Capital Transit Co.*, 108 F. Supp. 348 (D.D.C. 1952); *United States v. Shainline*, 151 F. Supp. 586 (E.D. Pa. 1957); 3 MOORE, FEDERAL PRACTICE § 13.29 (2d Ed. 1948); cf., *United States v. Wilkes-Barre Transit Corp.*, 143 F. Supp. 413 (M.D. Pa. 1956).

supra; *St. Louis-San Francisco Ry. v. United States*, *supra*; see also, *Crawford v. Pope & Talbot*, 206 F.2d 784, 795 (3rd Cir. 1953); *Damanti v. Inger*, 153 F. Supp. 600 (E.D.N.Y. 1957); *Mangone v. Moore-McCormack Lines, Inc.*, 152 F. Supp. 848 (E.D.N.Y. 1957); and *Pennsylvania R.R. v. McAllister Bros., Inc.*, 137 F. Supp. 788 (S.D.N.Y. 1956), *aff'd*, 240 F.2d 423 (2d Cir. 1957). Surely if the trial court's decision herein is correct, the only way for a person to avail himself of a right to contribution against the United States would be to induce the injured person to sue the Government, because the claim to indemnity or contribution would fall at the end of two years if plaintiff had not sued the United States by that time. Such a result is not supportable in reason, logic, or the reported cases. Plaintiff's institution of suit against the United States is not a necessary ingredient to one's right to contribution or indemnity against the United States.

The more logical view is that the Federal Tort Claims Act created no causes of action but merely provided a forum and a jurisdictional period of time within which the already recognized causes of action could be litigated against the United States. Reported cases establish that the court must look to the local law to determine whether that State recognizes the type of cause of action asserted and to determine when that cause of action accrues and then to the Federal Tort Claims Act to see what time limitations are applicable. *Young v. United States*, 87 U.S. App. D.C. 145, 184 F.2d 587 (1950); *State ex rel. Burkhardt v. United States*, 165 F.2d 869 (4th Cir. 1947); *Foote v. Public Housing Com'r.*, 107 F. Supp. 270 (W.D. Mich. 1952).

CONCLUSION

Keleket X-Ray Corporation's right to indemnity, if warranted by the facts to be developed, or contribution, if a joint tort-feasor relationship is established, is an important right which is well-established in the law of the District of Columbia. The claim could have been asserted in a separate action after the injured party's

action had been determined or by third-party complaint after the United States was no longer before the court. The cross-claim method, which Keleket chose, was equally available and was more convenient.

Serious problems would develop if the trial court's decision were to be sustained because it does violence to the well-established and orderly concepts of indemnity and contribution and because it "whittles" away at Federal Tort Claims Act jurisdiction in a manner which the Supreme Court of the United States has consistently rejected.

The United States was not originally sued by Gertrude Slater because her attorneys were unaware that the Department of Health, Education and Welfare, as an instrumentality of the United States, was not subject to suit. The deficiency is more technical than substantial and is of no true significance. The posture is as though plaintiff had voluntarily chosen not to sue the United States at all, or as though plaintiff agreed for some other reason not to sue. This is the type of situation that this Court has held may not affect the rights of indemnity and contribution. *Henry Fuel Co. v. Whitebread, supra.*

The United States is subject to suit in the same manner and to the same extent as a private individual. The Tort Claims Act contemplates actions for indemnity or contribution. The statute of limitations has not run. The District Court has jurisdiction and erred in dismissing the cross-claim. The judgment should be therefore reversed.

Respectfully submitted,

FRANK F. ROBERSON

JOHN P. ARNESS

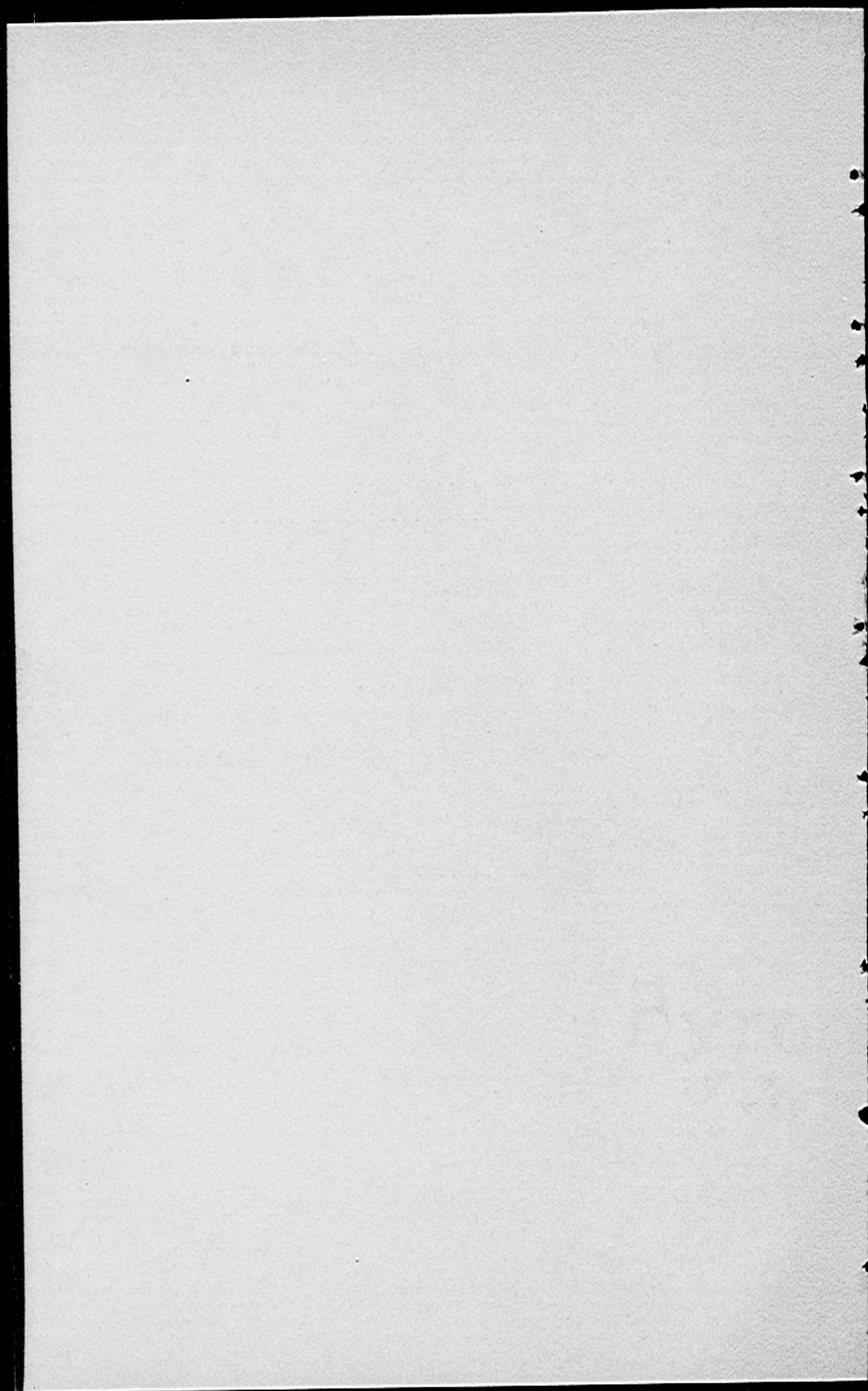
JOHN J. ROSS

Attorneys for Appellant

810 Colorado Building

Washington, D. C.

HOGAN & HARTSON
Of Counsel



APPENDIX

INDEX OF JOINT APPENDIX

	Page
Complaint	1
Amended Complaint	4
Motion To Extend Time	7
Points and Authorities in Support of Motion to Ex- tend Time	8
Answer of Appellant to Amended Complaint	9
Cross Claim Against United States	9
Motion of United States to Dismiss Cross Claim	10
Opposition of Appellant to Motion to Dismiss Supple- mental Memorandum of Appellant in Opposition to Motion to Dismiss	13
Opinion of Trial Court	16
Order of Trial Court	21
Docket Entries	22

JOINT APPENDIX

(Filed February 4, 1958)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 294-'58

GERTRUDE SLATER, 854 21st Street, N.E., Washington, D. C.,
Plaintiff

vs.

KELEKET X-RAY CORPORATION, a corporation,
226 Massachusetts Avenue, N.E., Washington, D. C.,

and

DEPARTMENT OF HEALTH, EDUCATION & WELFARE,
a corporation, T/a FREEDMEN'S HOSPITAL,
Independence Ave. and 4th Street, S.W., Washington, D. C.,
Defendants

Complaint for Personal Injury and Medical Expense

1. Jurisdiction of the Court is evoked by virtue of the amount in controversy being in excess of \$3,000.00, exclusive of costs, and under the Federal Tort Claims Act, 28 U.S.C.A. 2671 et Seq., 63 Stat. 106.

COUNT ONE

2. On the 27th day of April, 1956, Defendant Keleket X-Ray Corporation, a foreign corporation organized and existing under the laws of the State of Massachusetts and doing business in the District of Columbia, was engaged in the manufacture and distribution of X-ray machines, including a certain X-ray machine which it sold to Freedmen's Hospital in the District of Columbia, under a guaranty to keep same in reasonable repair. Said X-ray machine was in use by said hospital, and Plaintiff says

that it became and was the duty of Defendant Keleket X-Ray Corporation to use reasonable care and caution in the manufacture of said X-ray machine so as not to endanger the health or welfare of patients whose physical condition required its use, and to use reasonable care and prudence in the manufacture, testing, examination, and supervision of the cable in said X-ray machine so as to discover any and all defects existing in said cable, and thereby prevent hurt or injury befalling any patient in general and this Plaintiff in particular when using same. But Defendant, disregarding each and every duty resting upon it, did negligently, carelessly, or recklessly, fail to keep said X-ray machine in reasonable repair and did negligently, recklessly, or carelessly, cause said X-ray machine to be manufactured with a defective cable therein and sold and distributed same to Freedmen's hospital in said defective condition, thereby negligently causing Plaintiff to be severely injured while she was a patient in Freedmen's Hospital undergoing use of said X-ray machine, when said cable broke, causing the tube head to fall on Plaintiff's wrist; all of which was well known to the Defendant, Department of Health, Education, & Welfare, T/a Freedmen's Hospital, at the time of the infliction of said injuries upon the Plaintiff.

3. As a result of said negligence Plaintiff suffered the following injuries: compound fracture of the lower end of right radius, injuries to other portions of her body, physical pain and mental anguish, and loss of earnings, and Plaintiff incurred expenses for hospitalization, medical care and cure, all to Plaintiff's damages in the sum of \$35,000.00.

WHEREFORE, Plaintiff Gertrude Slater demands judgment against the Defendant Keleket X-ray Corporation in the sum of \$35,000.00, besides costs.

COUNT TWO

Plaintiff Gertrude Slater further sues the Defendant, Department of Health, Education, and Welfare, T/a Freedmen's Hospital, and for cause of action alleges:

4. That on the 27th day of April, 1956, Defendant Health, Education & Welfare, T/a Freedmen's Hospital was a Government owned corporation having complete control and supervision of Freedmen's Hospital; that on the date aforesaid Plaintiff was a paid patient in said hospital, whose treatment required X-ray pictures of her body, and Plaintiff says that it then and there became and was the duty of the Defendant, in its use of its X-ray Machine, to use reasonable care and prudence to determine whether the component parts of the said X-ray machine, including the cable therein, were safe, sound, and in good working condition, and would not injure Plaintiff while being used to X-ray her body. But notwithstanding the duty that rested upon Defendant as aforesaid, and well knowing the defective condition of said X-ray machine, Defendant disregarded each and every duty owed to Plaintiff and failed to make reasonable inspection of said cable in said X-ray machine before using it and did negligently use said X-ray machine in its defective condition on Plaintiff, thereby causing said cable to break and causing the tube head to fall on the Plaintiff's wrist with great force.

5. As a result of said negligence Plaintiff suffered the following injuries: compound fracture of the lower end of right radius, injuries to other portions of her body, physical pain and mental anguish, and loss of earnings, and Plaintiff incurred expenses for hospitalization, medical care and cure, all to Plaintiff's damages in the sum of \$25,000.00.

WHEREFORE, Plaintiff Gertrude Slater demands judgment against the Defendant Health, Education & Welfare De-

partment T/a Freedmen's Hospital, in the sum of \$25,000.00, besides costs.

s/ WILLIAM S. THOMPSON
Wm. S. Thompson
511 Sixth St., N. W.
ME. 8 - 1103
Attorney for Plaintiff

Jury Demand

Plaintiff, Gertrude Slater, by and through her attorney, demands trial by jury, as to Keleket Corporation only.

s/
Wm. S. Thompson

Filed May 1, 1958

Amended Complaint for Personal Injury and Medical Expense

Comes now the Plaintiff, with leave of the Court first had, and obtained, and files this her amended complaint as follows:

1. Jurisdiction of the Court is evoked by virtue of the amount in controversy being in excess of \$3,000.00, exclusive of costs, and under the Federal Tort Claims Act, 28 U.S.C.A. 2671 et Seq., 63 Stat. 106.

COUNT ONE

2. On the 27th day of April, 1956, Defendant Keleket X-ray Corporation, a foreign corporation organized and existing under the laws of the State of Massachusetts and doing business in the District of Columbia, was engaged in the manufacture and distribution of X-ray machines, including a certain X-ray machine which it sold to Freedmen's Hospital in the District of Columbia, under a guar-

anty to keep same in reasonable repair. Said X-ray machine was in use by said hospital, and Plaintiff says that it became and was the duty of Defendant Keleket X-ray Corporation to use reasonable care and caution in the manufacture of said X-ray machine so as not to endanger the health or welfare of patients whose physical condition required its use, and to use reasonable care and prudence in the manufacture, testing, examination, and supervision of the cable in said X-ray machine so as to discover any and all defects existing in said cable, and thereby prevent hurt or injury befalling any patient in general and this Plaintiff in particular when using same. But Defendant, Keleket X-ray Corporation, disregarding each and every duty resting upon it, did negligently, carelessly, or recklessly, fail to keep said X-ray machine in reasonable repair and did negligently, recklessly, or carelessly cause said X-ray machine to be manufactured with a defective cable therein and sold and distributed same to Freedmen's Hospital in said defective condition, thereby negligently causing Plaintiff to be severely injured while she was a patient in Freedmen's Hospital undergoing use of said X-ray machine, when said cable broke, causing the tube head to fall on Plaintiff's wrist; all of which was well known to the Defendant, United States of America, acting by and through its agency, Freedmen's Hospital, at the time of the infliction of said injuries upon Plaintiff.

3. As a result of said negligence Plaintiff suffered the following injuries: compound fracture of the lower end of right radius, injuries to other portions of her body, physical pain and mental anguish, and loss of earnings, and Plaintiff incurred expenses for hospitalization, medical care and cure, all to Plaintiff's damages in the sum of \$35,000.00.

WHEREFORE, Plaintiff Gertrude Slater demands judgment against Defendant Keleket X-ray Corporation in the sum of \$35,000.00, besides costs.

COUNT TWO

Plaintiff Gertrude Slater further sues the Defendant United States of America, under the Federal Tort Claims Act for negligence committed by its agency Freedmen's Hospital, and for cause of action alleges:

4. That on the 27th day of April, 1956, Defendant United States of America, acting by and through its agency, Freedmen's Hospital, a Government owned corporation, doing business in the District of Columbia, that on the date aforesaid Plaintiff was a paid patient in said hospital, whose treatment required X-ray pictures of her body, and Plaintiff says that it then and there became and was the duty of the Defendant, in its use of its X-ray machine, to use reasonable care and prudence to determine whether the component parts of said X-ray machine, including the cable therein were safe, sound, and in good working condition, and would not injure Plaintiff while being used to X-ray her body. But notwithstanding the duty that rested upon Defendant as aforesaid, and well knowing the defective condition of said X-ray machine, Defendant by and through its agency, Freedmen's Hospital, disregarded each and every duty owed to Plaintiff and failed to make a reasonable inspection of said cable in said X-ray machine before using it and did negligently use said X-ray machine in its defective condition on Plaintiff, thereby causing said cable to break and causing the tube head to fall on Plaintiff's wrist with great force.

5. As a result of said negligence, Plaintiff suffered the following injuries: compound fracture of the lower end of right radius, injuries to other portions of her body, physical pain and mental anguish, and loss of earnings, and Plaintiff incurred expenses for hospitalization, medical care and cure, all to Plaintiff's damages in the sum of \$25,000.00.

WHEREFORE, Plaintiff Gertrude Slater demands judgment against the Defendant United States of America, in the sum of \$25,000.00, besides costs.

s/
 Wm. S. Thompson
 511 Sixth Street, N. W.
 ME. 8 - 1103
Attorney for Plaintiff

Jury Demand

Plaintiff, Gertrude Slater, by and through her attorney, demands trial by jury as to Keleket Corporation only.

s/
 Wm. S. Thompson

Filed Feb. 4, 1959

Motion to Extend Time

Comes now defendant, Keleket X-ray Corporation, and moves this Court for a two week extension of time within which to answer the motion of defendant, United States of America, to dismiss and as reason therefor states that certain depositions have been scheduled for February 14, 1959 and the discovery contemplated is necessary to enable this defendant to take an intelligent position with respect to the status of its co-defendant in this cause.

WHEREFORE, defendant Keleket X-ray Corporation, moves this Court to extend the time within which its opposition may be filed to the motion for judgment on the pleadings

or, in the alternative, to dismiss to and including February 17, 1959.

HOGAN & HARTSON

By s/

John P. Arness

Attorneys for Defendant

Keleket X-ray Corporation

810 Colorado Building

Washington, D. C.

Filed Feb. 4, 1959

**Memorandum of Points and Authorities in Support
of Motion to Extend Time**

The motion to dismiss the United States of America from this cause should not be granted until the full facts surrounding plaintiff's claim have been developed so that the parties may take an intelligent position with respect to the status of the United States of America in this action. Depositions designed to reveal this situation have been scheduled for February 14, 1959. The factual situation has not heretofore been analysed because by letter dated March 12, 1958 counsel for this defendant asked leave of the United States Attorneys' office to interview the employees of Freedmens' Hospital. No reply was received until January, 1959, at which time the request was denied. This defendant then immediately proceeded to schedule the depositions. This Court is respectfully requested to withhold any action until the factual circumstances are known.

Respectfully submitted,

HOGAN & HARTSON

By s/

John P. Arness

Attorneys for Defendant

Keleket X-ray Corporation

Filed Feb. 25, 1959

Answer to Amended Complaint

FIRST DEFENSE

The amended complaint fails to state a cause of action entitling the plaintiff to relief.

SECOND DEFENSE

1. Defendant Keleket X-ray Corporation admits that it sold and installed in 1953 a certain X-ray machine in Freedmen's Hospital in the District of Columbia. It further admits that there exists a service agreement with said hospital and refers to that agreement for the best evidence of its obligations thereunder.

2. This defendant denies that the plaintiff's injuries resulted from any negligence or carelessness on its part, or on the part of any of its agents, servants, or employees. This defendant denies that it had any contract which extended rights to plaintiff and further denies any breach of its service agreement with its co-defendant.

3. This defendant is without knowledge or information sufficient to form a belief as to the injuries and damages, if any, sustained by the plaintiff.

4. This defendant denies each and every other allegation of the complaint not herein specifically answered.

**Cross Claim Against Defendant
United States of America**

The accident which gives rise to the complaint in this cause allegedly occurred on April 27, 1956 in the hospital owned, operated and controlled by the United States of America. If plaintiff was injured in the manner alleged and for the reasons specified in the Amended Complaint, such injuries were caused by the sole or contributory negligence of the United States of America, through its agents,

servants or employees and if this defendant is compelled to respond in damages to plaintiff, such liability will have been caused in whole or in part by the aforesaid negligence and carelessness of the United States of America and by the failure of the United States to employ suitable measures to avoid the accident. Accordingly it is or may be liable over to this defendant for all or a contributable portion of any sums to which plaintiff may be adjudged entitled against this defendant in this action.

WHEREFORE, defendant Keleket X-Ray Corporation demands judgment against defendant United States of America for all or a contributable portion of any sums to which plaintiff may be adjudged entitled against it in this action, plus the costs of defense, including reasonable attorneys fees, the costs of this action and all other further and proper relief in the premises.

HOGAN & HARTSON

By s/ JOHN P. ARNESS

Attorneys for Defendant
Keleket X-Ray Corporation
 810 Colorado Building
 Washington, D. C.

Filed April 23, 1959

**Motion to Dismiss Cross Claim Against Defendant
 United States of America**

Comes now the defendant, United States of America, by its attorney, the United States Attorney and respectfully moves this Court to dismiss the cross claim against it and as grounds therefore states that the cross claim is barred by the Statute of Limitations and that the cross

claim fails to state a claim against the defendant United States of America upon which relief may be granted.

/s/ OLIVER GASCH
Oliver Gasch
United States Attorney

/s/ EDWARD P. TROXELL
Edward P. Troxell, *Principal*
Assistant United States Attorney

/s/ JOHN F. DOYLE
John F. Doyle
Assistant United States Attorney

/s/ WILLIAM LAVERICK
William Laverick
Assistant United States Attorney

Filed May 6, 1959

**Memorandum of Points and Authorities in Opposition to
Motion to Dismiss Cross-Claim Against Defendant United
States of America**

The cross-claim filed in the above entitled cause seeks alternative relief by way of contribution or indemnity. It proceeds upon the theory that if plaintiff's claims are proven and accepted and this defendant is compelled to respond in damages to plaintiff, it will be entitled to indemnity or contribution from the United States of America. Under the facts as they have been demonstrated by the pleadings and by the oral depositions on file in this cause, it is clear that there is uncontrovertible merit to the cross-claim. Plaintiff was allegedly injured when an x-ray machine that had been operated for many years by the

United States in its Freedmen's Hospital fell. The only allegations against Keleket X-ray Corporation are to the effect that it caused the x-ray machine to be manufactured with a defective cable or that it failed to keep the cable in reasonable repair. The evidence demonstrates that there was no notice of any defect in the cable prior to 4:00 p.m. on the day before the accident. At that time the Freedmen's Hospital employees discovered a ravel in the wire. Notwithstanding this notice they continued to permit the machine to be operated and to be used upon the plaintiff. The motion to dismiss proceeds on two theories. First that the cross-claim is barred by the statute of limitation because it was not filed within two years from the date the tort occurred. The statute of limitations on claims for indemnity or contribution does not commence to run until there has been a disproportionate payment made by one of several prospective tort feasons. The cross-claim or third party action is permitted in anticipation of the determination of the plaintiff's claim in the main action so that all ancillary matters may be disposed of promptly thereafter. Actually the claim for contribution has not yet accrued and no statute could bar its assertion at this time.

The United States next complains that the cross-claim was not asserted until some ten months after the expiration of the time within which it could have been brought. The initial complaint in this cause was filed on February 4, 1958. By letter dated March 12, 1958 this defendant sought permission of the United States Attorney's office to interview the employees of Freedman's Hospital so that it could determine whether a crossclaim should be prepared. This defendant was asked to withhold action pending the decision of the United States Attorney's office. It received no reply until January 22, 1959 at which time its request was rejected and immediately thereafter the oral depositions were scheduled. This defendant has moved with expedition and should not be penalized by reason of the lapse of time

since it was occasioned by the dilatoriness of the defendant United States of America.

Respectfully submitted,

HOGAN & HARTSON

By s/ JOHN P. ARNESS

*Attorneys for Defendant
Keleket X-ray Corporation
810 Colorado Building
Washington, D. C.*

Filed May 12, 1959

**Supplemental Memorandum of Points and Authorities in
Opposition to Motion to Dismiss Cross-Claim Against
Defendant United States of America**

Drumgoole, et al. v. Virginia Electric & Power Company, 170 F. Supp. 824 (E.D. Va. 1959) is absolutely inapplicable to the issue presented herein. *Chicago, Rock Island and Pacific Ry. Co. v. United States*, 220 F 2d 939 (7th Cir. 1955) is factually pertinent and should be followed.

**THE MOTION TO DISMISS IS NOT SUPPORTED BY THE
REPORTED CASES**

In this jurisdiction actions for contribution and indemnity among tort feasers are allowed. They are independent actions, not dependent upon the plaintiff's right to proceed against both tort feasers. *Henry Fuel Co. v. Whitebread*, 99 U.S. App. D.C. 9, 236 F 2d 742 (1956).

The Tort Claims Act permits actions for contribution or indemnity against the United States either by way of cross-claim, third party complaint or separate action. *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951).

The United States in support of its motion to dismiss relies upon 28 U.S.C. 2401 (b) which in pertinent part

provides that an action against the United States shall be barred unless "... begun within two years after such claim accrues" There is no requirement that suit be instituted within two years after the *accident* or after the injury. The pertinent inquiry is when does the claim accrue.

A claim for contribution or indemnity does not accrue until a disproportionate payment has been paid by one of several prospective tort feorsors. *Satta v. New York*, 272 App. Div. 782, 69 N.Y.S. 2d 653; *Smith v. Smucker*, 198 Misc. 944, 100 N.Y.S. 2d 35; *McKay v. Citizens Rapid*, 190 Va. 851, 59 S.E. 2d 121.

The United States claims that because plaintiff in this action has disabled herself procedurally from pressing her claim against it, the Keleket X-ray Corporation is precluded from seeking contribution or indemnity. Plaintiff's claim was perfectly valid at first. She merely chose not to assert it. When plaintiff chose not to sue the United States at all co-tort feorsors were permitted to press contribution and indemnity claims. *St. Louis-San Francisco Ry. Co. v. United States*, 187 F 2d 925 (5th Cir. 1951); *Patterson v. Pennsylvania Ry. Co.*, 197 F 2d 252 (2nd Cir. 1952); *Howey v. Yellow Cab Co.*, 181 F 2d 967 (3rd Cir. 1950.)

The United States is subject to suit under the Tort Claims Act in the same manner and under the same circumstances as a private citizen would be. Claimant for contribution is not in the same position as the original injured person under Tort Claims Act. *Wojciuk v. United States*, 74 F. Supp. 914 (D. Wisc. 1948).

This defendant agrees for the purpose of this argument, that an action for contribution could not be maintained if there had been a substantive impediment to the maintenance of an action by the injured person against the United States. See, *Drumgoole, et al. v. Virginia Electric & Power Company, supra*.

The same is true in the case of a private individual. *Zaccari v. United States*, 130 F. Supp. 50 (D. Md. 1955). But that principle does not apply when the cause of action exists and only the remedy is lacking.

THE INSTANT CROSS-CLAIM IS CLEARLY MAINTAINABLE

One could not reasonably contend that the Keleket X-ray Corporation could be denied its otherwise effective right to contribution merely because plaintiff chose not to sue the United States. If such were the case there never would be a third party action against the United States because a perfect defense would be that the original plaintiff had not sued it. Assuming this easily demonstrated fundamental truth, what would be the situation if a third party claim were filed and then two years elapsed from the date of injury so that plaintiff could not assert a direct claim against the United States? Would the otherwise valid third party action wither and die? Certainly not. The law is clear. One tortfeasor's right to contribution or indemnity against another is separate and apart from plaintiff's original action. *Henry Fuel Co. v. Whitebread, supra*. *Chicago, Rock Island and Pacific Ry. Co. v. United States*, 220 F 2d 939 (7th Cir. 1955) is directly in point and should be decisive.

Respectfully submitted,

HOGAN & HARTSON

By s/ JOHN P. ARNESS

Attorneys for Defendant
Keleket X-ray Corporation
810 Colorado Building
Washington, D. C.

Filed May 12, 1959

Opinion

Oliver Gasch, United States Attorney; and William Laverick, Assistant United States Attorney, both of Washington, D. C., for the defendant United States of America.

John P. Arness, of Washington, D. C., for defendant Keleket X-ray Corporation.

Frederick H. Evans, of Washington, D. C., for the plaintiff.

The question presented at the present juncture of this case is whether the United States as a defendant in an action brought under the Federal Tort Claims Act and charged as a joint tort-feasor with a private individual or corporation, is liable for contribution to its co-defendant if the plaintiff's claim against the United States is barred by the statute of limitations. This cause is now before this court on a motion by the Government to dismiss a cross-claim for contribution.

The plaintiff was a patient at Freedmen's Hospital, an institution operated and maintained by the Government in Washington, D. C. She claims that she was injured by the fall of a portion of an X-ray machine and that the accident was caused by a defective cable in the apparatus. An action to recover damages has been brought jointly against the Keleket X-ray Corporation, which sold the machinery to the Government and was under contract to maintain it in good condition; and against the United States on the theory that the Government is liable under the Federal Tort Claims Act¹ for alleged negligence in using a defective machine. The accident is alleged to have taken place on April 27, 1956. This action was instituted on February 4, 1958. Originally the complaint did not name the United

¹ 60 Stat. 842 *et seq.*; 28 U.S.C. § 2674.

States as a defendant, but the Government was brought in as a party by an amended complaint filed on May 1, 1958. In its answer to the amended complaint, the corporate defendant interposed a cross-claim against the United States for contribution or indemnity. On motion of the United States, the plaintiff's complaint was dismissed as against the Government on the ground that the claim against it was barred by the two-year statute of limitations,² since the United States was added as a party defendant more than two years after the alleged accident. An amendment bringing in a new party defendant may not relate back to the time of the filing of the original suit.³

The Government now moves to dismiss the cross-claim for contribution on the ground that since no claim may any longer be asserted by the plaintiff against the Government, the latter should not be held liable for contribution to a joint tort-feasor. The situation obviously arises out of the fact that the period of limitations in the District of Columbia against persons other than the Government is three years, while the period of limitations prescribed by the Federal Tort Claims Act is only two years.⁴ While the Congress provided that local substantive law (i.e. *lex loci delicti*) should govern liability, it prescribed a uniform short statute of limitations for claims under this statute.

At the outset it seems desirable to determine the theoretical nature of the right of contribution as between joint tort-feasors. At common law contribution between tort-feasors did not exist. Modern enlightened tendencies gradually ameliorated the harshness and rigor of this doctrine. In many jurisdictions contribution as between joint tort feasors is now provided in varying degrees. In the District of Columbia, some years ago, it was introduced

² 28 U.S.C. § 2401(b).

³ *Lomax v. United States*, 155 F. Supp. 354; *Jacobsen v. United States*, 160 F. Supp. 491.

⁴ *Young v. United States*, 87 U. S. App. D. C. 145.

by judicial decisions.⁵ In passing it may be observed that this development is an illustration of the fact that the common law has not become static or petrified, but is still a living force and continues to grow and adjust itself to the needs of changing times and shifting conditions. This vitality has always been one of its principal characteristics. If a cause of action for contribution is deemed to be in *quasi-contract*, i.e. a contract implied in law *ex aequo et bono*, as distinguished from a contract implied in fact,⁶ the United States would not be liable for contribution, because the waiver of Governmental immunity to suit, does not apply to suits on contracts implied in law.⁷ The waiver is limited to real contracts, i.e., express contracts and contracts implied in fact, and does not extend to contracts created by a legal fiction without regard to the intention of the parties. On the other hand, if the duty of one of several joint tort-feasors to pay contribution to the others is to be deemed a part of the tort liability, it would necessarily follow that the scope of the Federal Tort Claims Act is broad enough to subject the Government to such an obligation.

It is sometimes said that a statute waiving Governmental immunity to suit should be narrowly and strictly construed. These expressions, however, are not applicable to the Federal Tort Claims Act. This statute is a sweeping, comprehensive measure enacted in accordance with modern progressive trends to waive Governmental immunity to suit in tort generally, and to place the Government, with certain limited exceptions, on a par with private citizens

⁵ *George's Radio, Inc. v. Capital Transit Co.*, 75 U.S. App. D.C. 187; *Knell v. Feltman*, 85 U.S. App. D.C. 22. In some States the right of contribution has been introduced by statute. Prosser, *Torts*, 247-249 (1955 ed.).

⁶ Keener on *Quasi Contracts*, 408.

⁷ *Merritt v. United States*, 267 U. S. 338; *United States v. Minnesota Mutual Investment Co.*, 271 U. S. 212, 217; *Alliance Assurance Co. v. United States*, 252 F. (2d) 529, 532; *Manufacturers Aircraft Assn. v. United States*, 77 Ct. Cl. 481, 519.

as to liability for torts committed by its agents in the course of their employment. The Act should receive a broad and liberal construction.⁸

The second view as to the nature of a claim for contribution has been adopted by the authorities in respect to the Federal Tort Claims Act and it has become established, therefore, that the United States is liable for contribution to a joint tort-feasor, *United States v. Yellow Cab Co.*, 340 U. S. 543. This obligation may be enforced by an independent action, by a counterclaim or by a cross-claim under Rule 13 of the Federal Rules of Civil Procedure. In *United States v. Yellow Cab Co.*, *supra*, Mr. Justice Burton pointed out that on its face the Act waives immunity from suit on any claim against the United States on account of damages to or loss of property, or on account of personal injury or death caused by the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment, under such circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred. He, in effect, reaches the conclusion that the words "any claim against the United States on account of damages to or loss of property, or on account of personal injuries or death", are broad enough to include claims for contribution, since such a claim may be said to be a claim on account of damages to or loss of property or on account of personal injuries or death.

In some jurisdictions, including the District of Columbia, however, the right of contribution or indemnity arises only against a joint tort-feasor who is directly liable to the injured party. If the former may not be required to pay damages to the latter, he is under no duty to pay contribu-

⁸ *United States v. Aetna Surety Co.*, 338 U.S. 366, 383; *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 703-4; *United States v. Yellow Cab Co.*, 340 U.S. 543, 547, 550.

tion to the party held liable to the victim of the tort.⁹ In the instant case the United States is not liable to the injured person because her claim has been barred by the statute of limitations. Consequently the Government should not be subjected to the burden of contribution. It is important to observe that the period of limitations prescribed by the Federal Tort Claims Act does more than merely create a defense, as is true of the ordinary statutes of limitations. The provision fixing a two-year period for the bringing of suits against the Government under the Federal Tort Claims Act is jurisdictional. It does not merely bar the remedy at the end of the period, but destroys the right, *Simon v. United States*, (5th C.) 244 F. (2d) 703.

A parallel situation was recently presented in *Drumgoole v. Virginia Electric & Power Co.*, 170 F. Supp. 824, in which Judge Bryan of the Eastern District of Virginia, wrote an able and convincing opinion. In that case an action was brought against an electric power company for damages for personal injuries sustained by enlisted members of the Army reserve while on active training duty. The original defendant brought in the United States as a third-party defendant, seeking contribution or indemnity on the alleged ground that the Government was a joint tort-feasor. The court pointed out that the Government was not liable under the Federal Tort Claims Act for injuries to members of the armed forces sustained by them in the course of the performance of their duties. This has been held to be in a sense an exception to the Federal Tort Claims Act.¹⁰ Judge Bryan pointed out that in Virginia, as is the case in the District of Columbia, while contribution between joint tort-feasors is permitted, it is withheld as against a joint offender who may not in law be forced to answer to the plaintiff for his negligence. On this ground the court reached the conclusion that under the

⁹ *Yellow Cab Co. of D. C. v. Dreslin*, 86 U.S. App. D.C. 327.

¹⁰ *Feres v. United States*, 340 U. S. 135.

circumstances of the case before it, the Government was not liable for contribution and dismissed the third-party complaint.

This principle is applicable to the case at bar. To be sure there is a difference in fact in that in the *Drumgoole* case the Government was not liable because of the status of the injured party; whereas in the case at bar the Government is not liable to the plaintiff, because the cause of action was extinguished by the time limitation. This difference in fact, however, does not lead to any distinction in principle, because, as has been shown above, the period of limitations prescribed by the Federal Tort Claims Act is not merely a statute of limitations barring the remedy, but is jurisdictional and destroys and extinguishes the cause of action upon the expiration of the period.

In view of the considerations here discussed, the conclusion is inescapable that the United States may not be held liable for contribution under the Federal Tort Claims Act if the claim of the injured party against the United States has become extinguished by the statute of limitations.

Accordingly the motion to dismiss the cross-claim of the defendant Keleket X-ray Corporation for contribution against the United States, is granted.

/s/ ALEXANDER HOLTZOFF
United States District Judge.

May 12, 1959.

Filed May 25, 1959

Order

This cause came on to be heard upon the motion of the defendant, The United States of America, to dismiss the cross-claim filed against it by defendant, Keleket X-Ray Corporation, for indemnity or in the alternative contribu-

tion, and upon consideration of said motion, memoranda of points and authorities filed in support thereof and in opposition thereto, and oral argument of counsel, it appearing to the Court that there is no just reason for delay in the entry of final judgment of dismissal, it is by the Court this 25 day of May, 1959,

ORDERED that the motion be granted and that the cross-claim be and the same is hereby dismissed.

It is further ORDERED that the Clerk is hereby directed to enter final judgment of dismissal of the cross-claim filed herein against defendant, The United States of America.

ALEXANDER HOLTZOFF
Judge

CIVIL DOCKET
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
No. 294-'58
GERTRUDE SLATER

v.

KELEKET X-RAY CORPORATION, a corporation,
UNITED STATES OF AMERICA

Action for Damages—Personal Injury & Medical Expense
\$60,000.00

Jury demand ☒

Attorneys:

For Gertrude Slater—

Wm. S. Thompson, 511 Sixth St., N. W., Frederick
H. Evans, 511 6th St., N. W.

For Keleket X-Ray Corporation—

Hogan & Hartson, 810 Colorado Bldg.

For United States of America—

Oliver Gasch, Edward P. Troxell, E. Riley Casey, John J. Doyle.

Date	Account	Rec'd	Disb'd
1958			
Feb. 4	Thompson	10.00	
Feb. 4	U. S. Treas.		10.00
1959			
Jun. 23	Arness	5.00	
Jun. 23	U. S. Treas.		5.00

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Date	Proceedings
1958	Deposit for cost by
Feb. 4	Complaint, appearance, Jury Demand—filed
Feb. 4	Summons, copies (2) and copies (2) of Complaint issued #1 ser 2-7-58 #2 ser 2-5-58
Feb. 24	Answer of deft. #1 to complaint c/m 2-24-58 App. Hogan & Hartson—filed
Apr. 7	Motion of deft #2 to dismiss complaint; c/m 4-7-58; App. Oliver Gasch, Edward P. Troxell, E. Riley Casey, John J. Doyle M.C. 4-7-58—filed
May 1	Amended complaint naming United States a deft. and demand for jury trial as to deft. #1 (fiat) Morris, J.—filed
May 1	Summons copy (1) and copy of amended complaint to USA US Atty ser 5-1-58; Atty Gen. served 5-6-58—filed
May 7	Motion of deft. to dismiss entered as withdrawn per counsel—filed
June 30	Answer of deft. #2 to complaint; c/m 6-30-58 App. Oliver Gasch, Edward P. Troxell, E. Riley Casey, John F. Doyle—filed

June 30—Calendared (N)
 Nov. 20—Called—McGuire, J.

1959

- Jan. 29—Notice of deft. #1 of taking depositions of Dr. T. W. Davis, Clarence Chisholm, Dr. Simmions & Mr. King; c/m 1-28-59—filed
- Jan. 30—Motion of deft. #2 to dismiss; P&A; c/m 1-30-59. MC 1-30-59—filed
- Feb. 4—Motion of deft. to extend time to answer motion to dismiss, c/m 2-4-59. P&A—filed
- Feb. 4—Stipulation of counsel extending time for plttf. to answer motion to dismiss or for judgment on pleadings to Mar. 30, 1959; c/m 2-4-59
- Feb. 25—Answer of deft. #1 to amended complaint, & cross-claim vs. deft. #2, c/m 2-24-59—filed
- Feb. 26—Consent order extending time for deft. Keleket X-Ray Corp to answer motion to dismiss to March 30, 1959. McGuire, J.
- Mar. 2—Deposition of T. W. Davis, A. H. Simmons, Clarence Chisholm & London King fee \$99.75 pd. by deft. #1—filed
- Apr. 23—Motion of deft. #2 to dismiss cross-claim; c/m 4/23/59; P&A. M. C. 4-24-59
- May 6—Memo of P&A of deft. #1 in opposition to motion to dismiss cross-claim, c/m 5-6-59—filed
- May 7—Motion to dismiss cross claim argued & submitted (Reporter—J. Rawls) Holtzoff, J.
- May 7—Appearance of Frederick H. Evans as atty. for plttf. (N/AC)—filed
- May 8—Supplemental P&A in support of motion to dismiss cross claim against U.S. c/m 5/8/59—filed
- May 12—Supplemental memo of P&A in opposition to motion to dismiss cross claim v deft. U.S.A., c/m 5/12/59—filed
- May 12—Opinion granting motion to dismiss cross-claim of deft., Keleket X-ray Corp. vs. U. S. A. Holtzoff, J. (N)

May 18—Order dismissing cause as to the deft. U. S. A. (N) Holtzoff, J.

May 25—Order granting the motion of deft. U. S. A. to dismiss the cross-claim & directing the Clerk to enter final judgment of dismissal of the cross-claim filed against deft. U. S. A. Micro. 5/26/59 (N) Holtzoff, J.

Jun. 23—Notice of Appeal by deft. Keleket X-Ray Corporation (copies mailed to William S. Thompson and U.S. Atty.) Deposit by Arness \$5.00.—filed

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15283

KELEKET X-RAY CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

OLIVER GASCH,
United States Attorney.

**CARL W. BELCHER,
WILLIAM LAVERICK,
LEWIS CARROLL,**
Assistant United States Attorneys.

United States Court of Appeals
For the
District of Columbia Circuit

FILED NOV 27 1959

Joseph W. Stewart

CLERK

QUESTIONS PRESENTED

This case involves the dismissal of a cross-claim. The plaintiff filed an action against two defendants alleging that she was injured by the fall of certain hospital equipment. She alleged that such injury was due to the negligent failure of one defendant (appellant herein), the manufacturer of the equipment, to abide with the terms of a guarantee to keep the equipment in reasonable repair. She further alleged that her injury was due to the negligent failure of the other defendant (appellee herein), the United States acting through its hospital, to inspect the equipment prior to use. The manufacturer filed a cross-claim against the United States, alleging that the injury was due to its sole and contributory negligence. Plaintiff's action as to the United States was dismissed as being barred by the statute of limitations (two years), although the action as to the manufacturer was covered by another statute (three years). The court below dismissed the cross-claim. In the opinion of appellee, the following questions are presented:

1. Is not indemnity different from contribution in the District of Columbia?
2. Is not a joint obligation a necessary component of the doctrine of contribution?
3. Must not a cross-claimant who seeks contribution from a co-party allege joint obligation?
4. Are not all suits against the United States to be in accordance with the limitations fixed by Congress when waiving the sovereign's immunity to suit?

(1)

INDEX

	Page
Counterstatement of the case.....	1
Statutes and rules involved.....	2
Summary of argument.....	4
Argument:	
I. Dismissal of the cross-claim was proper.....	5
II. The cross-claim is fatally defective.....	9
III. Indemnity and contribution are different.....	10
IV. Contribution is not a matter of right.....	18
Conclusion.....	27

TABLE OF CASES

<i>Alliance Assurance Co. v. United States</i> , 252 F. 2d 529 (2nd Cir. 1958).....	24
<i>Almour v. Pace</i> , 90 U.S. App. D.C. 63, 193 F. 2d 699 (1951).....	21
<i>American Mut. Liability Ins. Co. v. Matthews</i> , 182 F. 2d 322 (2nd Cir. 1950).....	22
<i>Ammond v. Pennsylvania Ry. Co.</i> , 125 F. 2d 747 (6th Cir. 1942).....	24
<i>Anderson v. Brady</i> , 7 F.R.D. 84 (D.C.E.D. Ky. 1946).....	24
<i>Anderson v. Yungkau</i> , 329 U.S. 482 (1947).....	21
<i>Atchison v. Wills</i> , 21 App. D.C. 548 (1903).....	14
<i>Bair v. Bryant</i> , 96 A. 2d 508 (Mun. Ct. App. D.C. 1953).....	34
<i>Baird v. John McShain, Inc.</i> , 108 F. Supp. 553 (D.C.D.C. 1952).....	23
<i>Bankers Indemnity Ins. Co. v. Cleveland H. & P. Co.</i> , 62 N.E. 2d 180 (Ohio 1945).....	23
<i>Barwick v. Pratt</i> , 52 F. Supp. 262 (D.C.E.D.S.C. 1943).....	25
<i>Bell v. Morton</i> , 225 Pac. 137 (Idaho 1924).....	34
<i>Blackhawk Hotels Company v. Bonfoe</i> , 227 F. 2d 232, 56 A.L.R. 2d 1047 (8th Cir. 1955).....	32
<i>Bohn v. American Export Lines</i> , 42 F. Supp. 228 (D.C.S.D.N.Y. 1941).....	18
<i>Bowles v. Crew</i> , 59 F. Supp. 809 (D.C.S.D. Calif. 1945).....	20
<i>Bowles v. Wilke</i> , 175 F. 2d 35 (7th Cir. 1949), cert. denied, 338 U.S. 861.....	21
<i>Bray v. Gross</i> , 108 A. 2d 850, 16 N.J. 382 (1954).....	18
<i>Brister & Koester Lumber Corp. v. United States</i> , 88 U.S. App. D.C. 197, 188 F. 2d 981 (1951).....	33
<i>Capital Transit Co. v. District of Columbia</i> , 96 U.S. App. D.C. 199, 225 F. 2d 38 (1955).....	14
<i>Cassell v. Taylor</i> , 100 U.S. App. D.C. 153, 243 F.2d 259 (1957).....	26, 34
<i>Central Asphalt v. Industrial Bank of Utica</i> , 153 N.Y.S. 2d 892 (1956).....	25
<i>Chapman v. Hoage</i> , 296 U.S. 526 (1936).....	24
<i>Chapman v. Hoage</i> , 64 App. D.C. 349, 78 F. 2d 233 (1937).....	22

IV

	Page
<i>The Chicago, Rock Island and Pacific Railway Company v. United States</i> , 220 F. 2d 939 (7th Cir. 1955).....	12, 13, 34
<i>Cincinnati & Texas Pacific Ry. v. Bohon</i> , 200 U.S. 221 (1906).....	24
<i>Coastal Air Lines v. Dockery</i> , 180 F. 2d 874 (8th Cir. 1950).....	18
<i>Coates v. Potomac Electric Power Co.</i> , 96 F. Supp. 1019 (D.C.D.C. 1951).....	10
<i>Cobb v. Shore</i> , 87 U.S. App. D.C. 162, 183 F. 2d 980 (1950).....	22, 33
<i>Cooper v. Rush</i> , 212 S.W. 94, 138 Ark. 602 (1919).....	34
<i>Crawford v. Pope & Talbot, Inc.</i> , 206 F. 2d 784 (3d Cir. 1953).....	31
<i>Cromer v. Sollitt Construction Company</i> , 16 F.R.D. 559 (D.C.S.D. W. Va. 1954).....	32
<i>Curtis v. Welker</i> , 54 App. D.C. 272, 296 Fed. 1019 (1924).....	14
<i>Dalehite v. United States</i> , 346 U.S. 15, at 30 (1953).....	27
<i>Damanti v. A/S Inger</i> , 153 F. Supp. 600 (D.C.E.D.N.Y. 1957).....	11
<i>David v. District of Columbia</i> , 88 U.S. App. D.C. 92, 187 F. 2d 204 (1950).....	14
<i>Davis v. L. L. Cohen & Co.</i> , 268 U.S. 638 (1925).....	22
<i>In re Dei's Estate</i> , 292 N.W. 513, 293 Mich. 651 (1940).....	24
<i>De La Forest v. Yandle</i> , 340 P. 2d 52 (D. Ct. App. Calif. 1959).....	32
<i>Dennig v. Meckfessel</i> , 261 S.W. 55, 303 Mo. 525 (1924).....	34
<i>DeVito v. Hoffman</i> , 91 U.S. App. D.C. 263, 199 F. 2d 468 (1952).....	35
<i>Di Benedictis v. United States</i> , 103 F. Supp. 462 (D.C.W.D. Pa. 1952).....	32
<i>Dierssen v. Woolever</i> , 3 F.R.D. 342 (D.C. Conn. 1944).....	22
<i>District of Columbia v. Frazer</i> , 21 App. D.C. 154 (1903).....	35
<i>D.C. Transit System Inc. v. Slingland</i> , — U.S. App. D.C. —, 266 F. 2d 465 (1959), cert. denied, — U.S. — (Oct. 12, 1959).....	5, 11, 27
<i>District of Columbia v. Stone</i> , 112 A. 2d 497 (Mun. Ct. App. D.C. 1955).....	17
<i>District of Columbia v. Thompson</i> , 281 U.S. 25 (1930).....	33
<i>District of Columbia v. Vignau</i> , 79 U.S. App. D.C. 188, 144 F. 2d 641 (1944), cert. denied, 323 U.S. 781.....	14
<i>District of Columbia v. World Fire & Marine Ins. Co.</i> , 68 A. 2d 222 (Mun. Ct. App. D.C. 1949).....	17
<i>Donofrio v. Farr Lincoln Mercury, Inc.</i> , 149 A. 2d 611, 54 N.J., Super. 500 (1959).....	32
<i>D'Onofrio Construction Company v. Recon Company</i> , 255 F. 2d 904 (1st Cir. 1958).....	34
<i>Drumgoole v. Virginia Electric & Power Co.</i> , 170 F. Supp. 824 (D.C.E.D. Va. (1959).....	5, 23
<i>Drummond v. Drummond</i> , 168 So. 428, 232 Ala. 401 (1936).....	33
<i>Durant v. Murdock</i> , 3 App. D.C. 114 (1894).....	35
<i>Edwards v. Doctors Hospital</i> , 242 F. 2d 888 (2d Cir. 1957).....	26
<i>Falls Industries, Inc. v. Consolidated Chem. Indus. Inc.</i> , 258 F. 2d 277 (5th Cir. 1958).....	18
<i>Farren v. N.J. Turnpike Authority</i> , 106 A. 2d 752, 31 N.J. Super. 356 (1954).....	23
<i>Fehlhaber Pile Co. v. Tennessee Valley Authority</i> , 81 U.S. App. D.C. 124, 155 F. 2d 864 (1946).....	22
<i>Feres v. United States</i> , 340 U.S. 135 at 140 (1950).....	9, 23
<i>Finn v. United States</i> , 123 U.S. 227 (1887).....	26, 33

	Page
<i>Fleming v. Sebastiani</i> , 161 F. 2d 111 (9th Cir. 1947)-----	21
<i>Foote v. Public Housing Com'r of United States</i> , 107 F. Supp. 270 (D.C.W.D. Mich. 1952)-----	33
<i>Gartner v. Lombard Bros.</i> , 197 F. 2d 53 (3rd Cir. 1952)-----	10, 18
<i>George Wimpey Co. Ltd. v. British Overseas Airways Corporation</i> , Law Reports, Appeal Cases, 1955, p. 174-----	6, 7, 8, 9, 13, 21, 27
<i>George's Radio v. Capital Transit Co.</i> , 75 U.S. App. D.C. 187, 126 F. 2d 219 (1942)-----	11
<i>Gilmore v. United States</i> , 129 F. 2d 199 (10th Cir. 1942)-----	24
<i>Globe Indemnity Co. v. Larkin</i> , 145 P. 2d 633, 62 Cal. App. 2d 891 (1944)-----	32
<i>Goldman v. Summerfield</i> , 94 U.S. App. D.C. 209, 214 F. 2d 858 (1954)-----	2
<i>Goodacre v. Shulmier</i> , 64 App. D.C. 10, 73 F. 2d 519 (1934)-----	35
<i>Great Lakes Auto Ins. Group of Chicago, Ill. v. Shepherd</i> , 95 F. Supp. 1 (D.C.W.D. Ark. 1951)-----	18
<i>Gulf, Colorado & Santa Fe Railway Co. v. McBride</i> , 322 S.W. 2d 492 (Texas 1957)-----	13
<i>Gwin v. Brown</i> , 21 App. D.C. 295 (1903)-----	35
<i>Hagan v. Central Avenue Dairy</i> , 18 F. 2d 502 (9th Cir. 1950)-----	19
<i>Halcyon Lines v. Haenn Ship Corp.</i> , 342 U.S. 282 (1952)-----	22
<i>Harris v. Buder</i> , 62 N.E. 2d 131, 326 Ill. App. 471 (1945)-----	33
<i>Hartford Accident & Indemnity Co. v. Interstate Equipment Corp.</i> , 74 F. Supp. 791 (D.C.N.J. 1947)-----	26
<i>Hassett v. Modern Maid Packers, Inc.</i> , 23 F.R.D. 661 (D.C. Md. 1959)-----	32
<i>Henry v. Rice</i> , 74 F. Supp. 222 (D.C.E.D. Mo. 1947)-----	25
<i>Henry Fuel Co. v. Whitebread</i> , 99 U.S. App. D.C. 9, 236 F. 2d 742 (1956)-----	18
<i>Hidick v. Orion Shipping & Trading Co.</i> , 157 F. Supp. 477 (D.C.S.D.- N.Y. 1957)-----	11, 13, 33
<i>Hodges v. United States Fidelity & Guaranty Co.</i> , 91 A. 2d 473 (Mun. Ct. App. 1952)-----	14
<i>Holmes v. Capital Transit Company</i> , 148 A. 2d 788 (Mun. Ct. App. D.C. 1959)-----	34
<i>Hoosier Cas. v. Fox</i> , 102 F. Supp. 214, 229 (D.C.N.D. Iowa 1952)-----	18
<i>Howard University v. Cassell</i> , 75 U.S. App. D.C. 75, 126 F. 2d 6 (1941), cert. denied, 62 S. Ct. 1046-----	33
<i>Hudson v. Lazarus</i> , 95 U.S. App. D.C. 16, 217 F. 2d 344 (1954)-----	35
<i>Humble Oil & Refinery Co. v. Martin</i> , 222 S.W. 2d 995, 1002 (Tex. 1949)-----	32
<i>Hurwitch v. Adams</i> , 151 A. 2d 286 (Dela. 1959)-----	26
<i>Invest-Import v. Seaboard Surety Company</i> , 18 F.R.D. 499 (D.C.S.D. N.Y. 1955)-----	18
<i>Jacobsen v. United States</i> , 160 F. Supp. 491 (D.C.E.D. Pa. 1958)-----	26
<i>Johansen v. United States</i> , 343 U.S. 427 (1952)-----	22
<i>Johnson v. Jordan</i> , 22 F. Supp. 286 (D.C.E.D. Okla. 1938)-----	25
<i>Kansas Gas & Electric Co. v. Evans</i> , 100 F. 2d 549 (10th Cir. 1938), cert. denied, 306 U.S. 665-----	24
<i>Kaplan v. Manhattan Life Ins. Co. of New York</i> , 71 App. D.C. 250, 109 F. 2d 463 (1939)-----	35
<i>Keffer v. Capital Transit</i> , 87 U.S. App. D.C. 13, 183 F. 2d 808 (1950)-----	22
<i>Knell v. Felman</i> , 85 U.S. App. D.C. 22, 174 F. 2d 662 (1949)-----	14

VI

<i>Kuhn v. Civil Aeronautics Board</i> , 87 U.S. App. D.C. 130, 183 F. 2d 839 (1950).....	Page 26
<i>Lake v. District of Columbia</i> , 63 App. D.C. 306, 72 F. 2d 174 (1934)...	17
<i>La Ferry v. Ajax Truck Rentals</i> , 161 F. Supp. 707 (D.C.E.D. Tenn. 1958).....	30
<i>Langford v. United States</i> , 101 U.S. 341 (1879).....	27
<i>Lanser v. Baumrin</i> , 151 N.Y.S. 2d 466 (1956).....	34
<i>Lilleberg v. Pacific Far East Line, Inc.</i> , 167 F. Supp. 3 (D.C.N.D. Calif. 1958).....	13
<i>Littlewood v. George Wimpey & Co., Ltd. and British Overseas Airways Corporation</i> , 2 All England Law Reports 1953, p. 915.....	6, 8, 9, 13
<i>LoBu v. United States</i> , 188 F. 2d 800 (2nd Cir. 1951).....	22
<i>Lomax v. United States</i> , 55 F. Supp. 354 (D.C.E.D. Pa. 1957).....	26
<i>In re Lunt's Trust</i> , 24 N.W. 2d 467, 237 Iowa 1097 (1946).....	34
<i>Mangone v. Moore-McCormack Lines</i> , 152 F. Supp. 848 (D.C.E.D.N.Y. 1957).....	13, 14, 23
<i>Manternach v. Jones County Farm Service Company</i> , 156 F. Supp. 574 (D.C.N.D. Iowa, 1957).....	24
<i>Manufacturers Aircraft Ass'n v. United States</i> , 77 Ct. Cls. 481 (1933)...	14
<i>Maryland Cas Co. v. Employers Mut. Liability Ins. Co.</i> , 208 F. 2d 731 (2d Cir. 1953).....	18
<i>Masheter v. Lanning</i> , 100 P. 2d 682, 151 Kan. 604 (1940).....	34
<i>May v. George A. Rheman Co.</i> , 51 F. Supp. 426 (D.C.S.D. Ga. 1943)...	25
<i>McDonald v. Government of the District of Columbia</i> , 95 U.S. App. D.C. 305, 221 F. 2d 860 (1955).....	17
<i>McKay v. Citizens Rapid Transit Co.</i> , 59 S.E. 2d 121, 190 Va. 851 (1950).....	33
<i>McKenna v. Austin</i> , 77 U.S. App. D.C. 228, 134 F. 2d 659, 148 A.L.R. 1253 (1943).....	14
<i>James McWilliams Blue Line v. Esso Standard Oil Co.</i> , 123 F. Supp. 824 (D.C.S.D.N.Y. 1954).....	11, 34
<i>Merritt v. United States</i> , 267 U.S. 338 (1925).....	14
<i>Messenger v. United States</i> , 231 F. 2d 328 (2nd Cir. 1956).....	22
<i>Mijon v. Acquaire</i> , 144 A. 2d 161, 51 N.J. Super. 426 (1958).....	10
<i>Mine Safety Appliances Co. v. Forrestal</i> , 326 U.S. 371 (1945).....	22
<i>Moretz v. General Electric Company</i> , 170 F. Supp. 698 (D.C.W.D. Va. 1959).....	23, 32
<i>Morgan v. United States</i> , 143 F. Supp. 580 (D.C.N.J. 1956).....	18
<i>Mosseller v. United States</i> , 158 F. 2d 380 (2nd Cir. 1946).....	19
<i>Mount Vernon Mortgage Corp. v. United States</i> , 98 U.S. App. D.C. 429, 236 F. 2d 724 (1956).....	24
<i>Murfkan v. Kahn</i> , 11 F.R.D. 520 (D.C.S.D. Fla. 1951).....	24
<i>National Biscuit Company v. United States</i> , 156 F. Supp. 916 (Ct. Cl. 1957).....	26
<i>National Lead Co. v. City of New York</i> , 43 F. 2d 914 (2nd Cir. 1930)...	17
<i>New York and Cuba Mail Steamship Co. v. United States</i> , 172 F. Supp. 684 (Ct. Cls. 1959).....	18
<i>New York & Porto Rico S.S. Co. of New York v. Lee's Lighters</i> , 48 F. 2d 372 (D.C.E.D.N.Y. 1930).....	34
<i>Northwest Airlines v. Glenn L. Martin Company</i> , 161 F. Supp. 452 (D.C. Md. 1958).....	11, 34

VII

<i>Aarhus Oliefabrik, A/S v. A. O. Smith Corporation</i> , 22 F.R.D. 33 (D.C. E.D. Wisc. 1958).....	Page 24
<i>Ottenstein v. Julius Garfinckel & Co.</i> , 151 A. 2d 925 (Mun. Ct. App. 1959).....	14
<i>Panichella v. Pennsylvania Railroad Company</i> , 167 F. Supp. 345 (D.C. W.D. Pa. 1958).....	23, 34
<i>Peake v. Ramsey</i> , 43 A. 2d 763 (Mun. Ct. App. 1945).....	14
<i>Peak Drilling Co. v. Halliburton Oil Well Cementing Co.</i> , 215 F. 2d 368 (10th Cir. 1954).....	22
<i>Pennsylvania Railroad Company v. McAllister Lighterage Line</i> , 137 F. Supp. 788, <i>aff'd.</i> , 240 F. 2d 423 (2d Cir. 1957).....	31
<i>Pierce v. Perlite Aggregates</i> , 110 F. Supp. 684 (D.C.N.D. Calif. 1952).....	19
<i>Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co.</i> , 206 F. 2d 336 (9th Cir. 1953), <i>cert. denied</i> , 346 U.S. 899.....	20
<i>Pope & Talbot, Inc. v. Hawn</i> , 346 U.S. 406 (1953).....	22
<i>Potomac Electric Power Co. v. Cardillo</i> , 71 App. D.C. 163, 107 F. 2d 962 (1939).....	35
<i>Powell v. Barker</i> , 101 S.E. 2d 113, 96 Ga. App. 592 (1957).....	33
<i>Prost v. City of New York</i> , 73 N.Y.S. 2d 811, 190 Misc. 197 (1947).....	34
<i>Pullman Co. v. Jenkins</i> , 305 U.S. 543 (1939).....	24
<i>Reynolds v. Needle</i> , 77 U.S. App. D.C. 53, 132 F. 2d 161 (1942).....	33
<i>R.F.C. v. Menihan Corp.</i> , 312 U.S. 81 (1941).....	22
<i>Rushford v. United States</i> , 204 F. 2d 831 (2nd Cir. 1953).....	19
<i>Sabat v. Pennsylvania Ry. Co.</i> , 157 F. Supp. 325 (D.C.E.D. Pa. 1958).....	11, 13, 32
<i>Sappington v. Barrett</i> , 86 U.S. App. D.C. 334, 142 F. 2d 102 (1950).....	17
<i>Sardo v. McGrath</i> , 90 U.S. App. D.C. 195, 196 F. 2d 20 (1952).....	2
<i>Schott v. Colonial Baking Co.</i> , 111 F. Supp. 13 (D.C.W.D. Ark. 1953).....	13
<i>Shugard v. Hoage</i> , 67 App. D.C. 52, 89 F. 2d 796 (1937).....	22
<i>Silber v. James Drug Stores</i> , 11 A. 2d 756, 124 N.J.L. 401 (1940).....	25
<i>Simon v. United States</i> , 244 F. 2d 703 (5th Cir. 1957).....	5, 26
<i>Slattery v. Marra Bros.</i> , 186 F. 2d 134 (2nd Cir. 1951).....	22, 31
<i>Smith v. McDowell Furniture Co.</i> , 16 S.E. 2d 685, 220 N.C. 155 (1941).....	25
<i>Smither and Company, Inc. v. Coles</i> , 100 U.S. App. D.C. 68, 242 F. 2d 220 (1957), <i>cert. denied</i> , 354 U.S. 914.....	23
<i>Snyder v. Buck</i> , 340 U.S. 15 (1950).....	21
<i>Southern Pacific Co. v. Raish</i> , 205 F. 2d 389 (9th Cir. 1953).....	19
<i>Southern Ry. Co. v. Smith</i> , 191 S.E. 181, 55 Ga. App. 689 (1937).....	25
<i>Southwest Lime Co. v. Lindley</i> , 12 F.R.D. 484 (D.C.W.D. Ark. 1952).....	18
<i>St. Louis-San Francisco Ry. Co. v. United States</i> , 187 F. 2d 925 (5th Cir. 1951).....	12, 31
<i>St. Paul Fire & Marine Insurance Co. v. Cunningham</i> , 257 F. 2d 731 (9th Cir. 1958).....	34
<i>St. Paul Fire & Marine Insurance Co. v. United States Lines Co.</i> , 258 F. 2d 374 (2d Cir. 1958).....	34
<i>State v. Dinwiddie</i> , 213 S.W. 2d 127 (Mo. 1948).....	33
<i>State of Maryland v. United States</i> , 165 F. 2d 869 (4th Cir. 1947).....	26
<i>Stone v. District of Columbia</i> , 99 U.S. App. D.C. 32, 237 F. 2d 28 (1956), <i>cert. denied</i> , 77 S. Ct. 221.....	17
<i>Terminal R. Ass'n of St. Louis v. United States</i> , 182 F. 2d 149 (8th Cir. 1950).....	13, 32

VIII

	Page
<i>Tessier v. United States</i> , 269 F. 2d 305 (1st Cir. 1959)-----	10, 26
<i>Texas Employers Ins. Ass'n. v. Felt</i> , 150 F. 2d 227 (5th Cir. 1945)---	24
<i>Thomas v. Malco Refineries</i> , 214 F. 2d 884 (10th Cir. 1954)-----	11
<i>Tolbert v. Jackson</i> , 99 F. 2d 513 (5th Cir. 1958)-----	24
<i>Troeger v. Fink</i> , 332 P. 2d 779 (Calif. 1959)-----	24
<i>Unexcelled Chemical Corp. v. United States</i> , 345 U.S. 59 (1953)-----	33
<i>Union Paving Co. v. Thomas</i> , 9 F.R.D. 612 (D.C.E.D. Pa. 1949)-----	33
<i>Union Stock Yds Co. v. Chicago B. & Q. R. Co.</i> , 196 U.S. 217 (1905)---	32
<i>United States v. Acord</i> , 209 F. 2d 709 (10th Cir. 1954), <i>cert. denied</i> , 347 U.S. 975-----	18
<i>United States v. Bristow</i> , 142 F. Supp. 601 (D.C.E.D. Va. 1956)-----	20
<i>United States v. Capital Transit Co.</i> , 108 F. Supp. 348 (D.C.D.C. 1952)---	20, 33
<i>United States v. Chicago R.I. & P. Ry. Co.</i> , 171 F. 2d 377 (10th Cir. 1949)-----	12, 13
<i>United States v. Gilman</i> , 347 U.S. 507 (1954)-----	17
<i>United States v. Glenn</i> , 231 F. 2d 884 (9th Cir. 1956)-----	20
<i>United States v. Great Northern Ry. Co.</i> , 32 F. Supp. 651 (D.C. Mont. 1940)-----	20
<i>United States v. Hosteen Tse-Kesi</i> , 191 F. 2d 518 (10th Cir. 1951)-----	18
<i>United States v. Krasnov</i> , 109 F. Supp. 143 (D.C.E.D. Pa. 1952)-----	22
<i>United States v. Lee</i> , 106 U.S. 196 (1882)-----	27
<i>United States v. Lindsay</i> , 346 U.S. 568 (1954)-----	33
<i>United States v. Lushbough</i> , 200 F. 2d 717 (8th Cir. 1952)-----	18
<i>United States v. Martinez</i> , 184 U.S. 441 (1902)-----	22
<i>United States v. Michel</i> , 282 U.S. 656 (1931)-----	22
<i>United States v. Minnesota Mutual Investment Co.</i> , 271 U.S. 212 (1926)---	14
<i>United States v. Moreland</i> , 258 U.S. 433 (1922)-----	22
<i>United States v. Reid</i> , 251 F. 2d 691 (5th Cir. 1958)-----	33
<i>United States v. Reynolds</i> , 345 U.S. 1 (1953)-----	19
<i>United States v. Shainfine</i> , 151 F. Supp. 586 (D.C.E.D. Pa. 1957)-----	20
<i>United States v. Shaw</i> , 309 U.S. 495 (1940)-----	20, 25
<i>United States v. Spelar</i> , 338 U.S. 217 (1949)-----	23
<i>United States v. State of Arizona</i> , 214 F. 2d 389 (9th Cir. 1954)-----	22, 25
<i>United States v. State Bridge Commission of Michigan</i> , 109 F. Supp. 690 (D.C.E.D. Mich. 1953)-----	20
<i>United States v. U.S. Fidelity Co.</i> , 309 U.S. 506 (1940)-----	25
<i>United States v. Webb Trucking Co.</i> , 141 F. Supp. 573 (D.C. Del. 1956)---	33
<i>United States v. Wilkes-Barre Transit Corp.</i> , 143 F. Supp. 413 (D.C.-M.D. Pa. 1956)-----	20, 33
<i>United States v. Yellow Cab Co.</i> , 340 U.S. 543 (1951)-----	14, 17
<i>Val Marine Corporation v. Costas</i> , 256 F. 2d 911 (2d Cir. 1958)-----	32
<i>Vickers Petroleum Co. v. Biffle</i> , 239 F. 2d 602 (10th Cir. 1956)-----	11
<i>Wallace v. United States</i> , 142 F. 2d 240 (2d Cir. 1944)-----	26
<i>Warner v. Capital Transit Company</i> , 162 F. Supp. 253 (D.C.D.C. 1958)-----	14
<i>Washington Building Realty Corporation v. Peoples Drug Stores</i> , 82 U.S. App. D.C. 119, 161 F. 2d 879 (1947)-----	10
<i>Washington Gas Light Co. v. District of Columbia</i> , 161 U.S. 316 (1896)---	32
<i>Webster v. Clodfelter</i> , 76 U.S. App. D.C. 171, 130 F. 2d 434, 143 A.L.R. 280 (1942), <i>cert. denied</i> , 317 U.S. 689-----	22

	Page
<i>Wilson v. Crutcher</i> , 56 P. 2d 416, 176 Okl. 481 (1936).....	34
<i>Wilson v. Massages</i> , 32 S.E. 2d 335, 224 N.C. 705 (1944).....	15, 23
<i>Yellow Cab Co. of D.C. v. Dreslin</i> , 86 U.S. App. D.C. 327, 181 F. 2d 626, 19 A.L.R. 2d 1001 (1950).....	15, 22
<i>Yellow Cab Co. of D.C. v. Janson</i> , 86 U.S. App. D.C. 38, 179 F. 2d 54 (1949).....	15, 22
<i>Young v. United States</i> , 87 U.S. App. D.C. 145, 184 F. 2d 587, 21 A.L.R. 2d 1458 (1950).....	26, 33
<i>Zontelli Brothers v. Northern Pacific Railway Co.</i> , 263 F. 2d 194 (8th Cir. 1959).....	15, 21

OTHER REFERENCES

Federal Rules of Civil Procedure:

Rule 4.....	19
Rule 4(d).....	19
Rule 4(d)(4).....	22
Rule 5.....	19
Rule 6(b).....	26
Rule 7(a).....	19
Rule 8(a).....	10, 19
Rule 8(b).....	26
Rule 8(c).....	26
Rule 8(e)(2).....	19
Rule 12(b).....	19
Rule 12(h).....	19, 26
Rule 13(g).....	19, 21
Rule 13(h).....	19
Rule 13(i).....	19
Rule 14(a).....	19
Rule 14(b).....	19
Rule 18(a).....	19
Rule 20.....	19
Rule 20(a).....	26
Rule 21.....	19
Rule 22.....	19
Rule 22(1).....	19
Rule 24.....	19
Rule 25(a)(1).....	21
Rule 25(a)(2).....	21
Rule 25(d).....	21
Rule 41(a).....	19
Rule 41(c).....	19
Rule 42(b).....	19
Rule 54(b).....	19
Rule 55(d).....	19
Rule 56(b).....	19
Rule 56(d).....	19
Rule 81(e).....	19

District of Columbia Code (1951 ed.):

	Page
§ 1-804	16
§ 1-902	17
§ 11-718	16
§ 12-201	16, 17
§ 12-205	21, 26
§ 12-208	6, 16, 17
§ 13-217	16
§ 15-101	16
§ 15-102	16
§ 16-702	16, 17
§ 16-703	16, 17
§ 16-1202	16, 17
§ 16-1501	16
§ 16-1611	16
§ 28-2673	18
§ 28-2677	18
§ 28-2704	16
§ 38-115	16
§ 38-303	16
§ 44-404	16
§ 45-1405	16
 Statutes:	
Federal Employers Liability Act, 53 Stat. 1404 (1939)	6
28 U.S.C. § 1331	25
28 U.S.C. § 1332	25
28 U.S.C. § 1346(a)(2)	13, 14
28 U.S.C. § 1346	25
28 U.S.C. § 1346(2)(b)	9, 10, 14
28 U.S.C. § 1402	25
28 U.S.C. § 1402(b)	10, 14
28 U.S.C. § 1491	10
28 U.S.C. § 1504	10
28 U.S.C. § 2110	10
28 U.S.C. § 2401(a)	14
28 U.S.C. § 2401(b)	9, 10, 14, 20
28 U.S.C. § 2402	10
28 U.S.C. § 2404	21
28 U.S.C. § 2673	18
28 U.S.C. § 2674	9, 14, 15
28 U.S.C. § 2677	18
28 U.S.C. § 2680	23
45 U.S.C. § 51	12
45 U.S.C. § 56	6
36 Stat. 1093	9
53 Stat. 1404	6
60 Stat. 842	9
60 Stat. 971	9
63 Stat. 62	9

Articles:

"Actions Between to Tortfeasors—the Implied Right of Indemnity", 32 So. Calif. Law Review 293 (1959).....	Page 30
"Contribution-Federal Tort Claims Act—Rights of the United States to Contribution Determined by State Law", 33 Texas Law Review 943 (1955).....	30
"Tort-Contribution among Tortfeasors where United States is a Party", 30 Washington Law Review 76 (1955).....	30
"Contribution, Indemnity, Impleader and Joinder Under the Federal Tort Claims Act", 100 University of Pennsylvania Law Review 562-575 (1952).....	30
"Modern Trend of the Law of Contribution Among Joint Tortfeasors", 6 Montana Law Review 34 (1945).....	30
"Contribution or Indemnity Among Joint Tortfeasors", 18 Notre Dame Lawyer 36 (1942-43).....	30
Articles on Tort Actions Against Governing Bodies, 9 Law and Contemporary Problems 179-370 (1942).....	31
"Contribution and Indemnity Among Tortfeasors", 26 Texas Law Review 150-173 (1947).....	31
"Federal Liability for Personal and Property Damage", 29 New York University Law Review 1321-1461 (1954).....	31
"Federal Tort Claims Act", 7 Vanderbilt Law Review 175-270 (1954).....	31
"Some Aspects of Contribution and Indemnity in Tort Actions Against the United States", 9 Federal Bar Journal 391-410 (1948).....	31
"Torts-Contribution Between Joint Tortfeasors Where the Liability of One Is Fixed by a Workman's Compensation Statute", 28 Temple Law Quarterly 303-307 (1954).....	31
"Pleading and Practice: Federal Tort Claims Act: Joinder of Individuals with United States as Joint Tortfeasors", 1 Oklahoma Law Review 86-90 (1948).....	31
"Contribution: Limitation on the Liability of One Tortfeasor", 16 Washington & Lee L. Review 109-115 (1959).....	31
"Contribution Among Tortfeasors: A Uniform Practice", 1938 Wisconsin Law Review 365-397.....	31
"Contribution among Joint Tortfeasors: A Pragmatic Criticism", 54 Harvard Law Review 1156 <i>et seq.</i>	31
Brief for United States, <i>United States v. D.C. Transit System, Inc.</i> , No. 14649 and 14706 (pp. 11-15).....	31
67 Harvard Law Review 896 (1954).....	6
Limitations of Claims to Contribution Between Tortfeasors, 103 Law, J. 211-212.....	8
A Problem in Contribution: The Tortfeasor With an Individual Defense Against the Injured Party", 1940 Wisconsin Law Review 467-502, at 483.....	7
45 Harvard L. Review 349.....	14
28 Temple Law Quarterly 303, 305 (1951).....	15
3 A.L.R. 2d 704.....	17
8 A.L.R. 2d 6.....	26, 34
20 A.L.R. 2d 925.....	34
17 A.L.R. 2d 735.....	19

XII

Treatises:

Moore's Federal Practice, 2d Edition:

Paragraphs 3.07(5)(6)(7); 4.28; 7.04; 8.07(1); 8.12; 8.13; 12.10; 12.23; 13.02; 13.10; 13.14(3); 13.15(2); 13.19(2); 13.21; 13.25; 13.26; 13.28; 13.29; 13.24; 13.25; 14.03(3); 14.08; 14.09; 14.10; 14.11; 14.17; 14.21; 14.23(2); 14.29; 15.15; 17.09; 18.05(4); 18.07(3); 18.08; 18.10(3); 19.11; 19.15; 19.19; 20.06; 20.07(3); 33.31(2); 41.09; 41.15; 54.35(2); 54.43; 55.11; 56.58; 56.26; 57.27; 82.01-----	Page 35
---	------------

Barron and Holtzoff, Federal Practice and Procedure:

Paragraphs: 23, 54, 75, 84, 127, 163, 279, 281, 370, 391-393, 397-399, 402, 424, 448, 452, 533, 1193.2-----	36
--	----

Restatement of Torts, § 875, 882-----	18
---------------------------------------	----

Prosser on Torts, p. 1101-----	18
--------------------------------	----

3 Moore's Federal Practice, 2d Ed., Section 13-36, p. 98-----	20
---	----

Clerk and Lindsell on Torts, 11th Ed. (1959)-----	8
---	---

Section 14, Joint Tortfeasors, § 176 et seq., at p. 111-----	8
--	---

1 Harper and James, The Law of Torts (1956), § 10.1, et seq., p. 692-----	32
--	----

2 Personal Injury, Actions, Defenses, Damages (Matthew Bender & Co., 1957), p. 621 et seq.-----	32
--	----

IV Restatement of the Law, Torts, Chap. 44, § 875, et seq., p. 434-----	32
--	----

Restatement of the Law, Restitution, Sec. 85, Title C, p. 385-----	32
--	----

13 Am. Jur., Contribution, § 1, et seq.-----	33
--	----

18 CJS Contribution § 1, et seq.-----	33
---------------------------------------	----

Legislative History:

Hearings before Subcommittee No. 1 of the House Judiciary Committee on H.R. 7236, 76 Cong. 3d Sess., 21; H.R. 7236, 76 Cong., 3d Sess. 21-----	13
H. Rep. 1754, 8th Cong., 2d Sess. 2-----	13

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,283

KELEKET X-RAY CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This case involves the dismissal of a cross-claim. On February 4, 1958 as action was filed against appellant Keleket X-Ray Corporation (referred to hereafter as Keleket), and the Department of Health, Education and Welfare (J.A. 1-4). Keleket answered but no cross-claim was included. The Department moved to dismiss on the ground of unconsented suit against the United States. Having received ex parte permission on April 30, 1958, plaintiff filed an amended complaint on May 1, 1958 (J.A. 4-7).

The amended complaint named Keleket and the United States as defendants, alleging the date of the injury to be April 27, 1956 (J.A. 4, 6) (i.e. more than two years prior to the filing of the amended complaint). On February 25, 1959, Keleket filed an answer, including a cross-claim against the United States (J.A. 9-10). The complaint was dismissed and a motion to dismiss the cross-claim (J.A. 10-11), was granted (J.A. 16-22). The opinion of the District Court is contained in 172 F. Supp. 715 (1959).

Keleket has pursued this appeal from the order dismissing the cross-claim. The plaintiff has not appealed the order dismissing the complaint. As to the factual matter contained in the Statement of the Case, see *Sardo v. McGrath*, 90 U.S. App. D.C. 195, 196 F. 2d 20 (1952), and *Goldman v. Summerfield*, 94 U.S. App. D.C. 209, 214 F. 2d 858 (1954).

STATUTES AND RULES INVOLVED

Title 28 U.S.C. § 1346 provides:

UNITED STATES AS DEFENDANT

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws;

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance

with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of:

- (1) Any civil action or claim for a pension;
- (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States.

Title 28 U.S.C. § 2401 provides:

TIME FOR COMMENCING ACTION AGAINST UNITED STATES

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding \$1,000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding \$1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

Title 28 U.S.C. § 2674 provides:

LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Rule 13, Federal Rules of Civil Procedure, Title 28 U.S.C. provides, in pertinent part:

(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

SUMMARY OF ARGUMENT

1. In a case involving a factual situation precisely the same as is presented in the instant case and involving statutes of comparable applicability, the House of Lords in England decided that contribution was not available by way of cross-claim to one seeking from another when the latter's liability to the plaintiff was barred by the statute of limitation. The decision of the House of Lords, and the reasoning thereof, recommends itself as the proper solution of this cause.

2. One who seeks contribution or indemnity must state a proper claim. The cross-claim filed in the instant case does

not do so. Therefore, the dismissal thereof may be sustained on separate grounds.

3. Courts have been careful to distinguish between indemnity and contribution. This is especially true in the District of Columbia. Accordingly, it is not now open for Keleket to equate the two principles and to claim under both.

4. In enacting the Federal Tort Claims Act, Congress gave careful considerations to the doctrines of sovereign immunity. In waiving such doctrine and in consenting to be sued in tort, Congress affixed certain exceptions and certain limitations. One of these, is the two year period in which such actions must be brought. It is not open for the Government to waive this limitation. Hence, all actions must be in accordance with the grant extended by Congress. Once the two year period expired, the plaintiff's claim against the United States expired. This also caused any joint liability existent between the United States and Keleket to expire.

ARGUMENT

I. Dismissal of the cross-claim was proper

Relying, *inter alia*, upon *Simon v. United States*, 244 F. 2d 703 (5th Cir. 1957), and *Drumgoole v. Virginia Electric & Power Co.*, 170 F. Supp. 824 (D.C.E.D. Va. 1959), the District Court held that " * * * the conclusion is inescapable that the United States may not be held liable for contribution under the Federal Tort Claims Act if the claim of the injured party against the United States has become extinguished by the statute of limitations." (J.A. 21). The order dismissing the cross-claim of appellant for contribution against the United States was proper and must be sustained.¹

Although it appears that "The question of whether contribution should be granted a defendant after a shorter statute of limitations had run in favor of his joint tortfeasor is as yet

¹ For the convenience of the Court when considering a problem in a "controversial" and "unsettled field of tort law", *D.C. Transit System Inc. v. Slingland*, — U.S. App. D.C. —, 266 F. 2d 465, 470 (1959), *cert. denied*, — U.S. — (Oct. 12, 1959), and to avoid cumbersome footnotes, an appendix is attached to this brief wherein partial lists of pertinent citations are included.

unlitigated in the United States";² the precise issue has been authoritatively decided in England—and adversely to Keleket's position herein. *Littlewood v. George Wimpey & Co. Ltd.* and *British Overseas Airways Corporation*, 2 All England Law Reports 1953, p. 915, affirmed in the House of Lords, *George Wimpey & Co. Ltd. v. British Overseas Airways Corporation*, Law Reports, Appeal Cases, 1955, p. 174.

The facts in the *Wimpey* case were stated as follows by the House of Lords:

An employee of the respondent public authority who was injured in 1949 in a collision between one of its vehicles and a vehicle owned by the appellant company, brought an action against the company more than 12 months after the accident, claiming damages for negligence. The company served a third party notice on the public authority claiming contribution under section 6(1)(c) of the Act of 1935 in the event of its being liable to the injured man. Later the public authority was joined as second defendant and pleaded as a defense to both the claim in the action and the third party proceedings that it was protected by section 21(1) of the Limitation Act, 1939, in that the proceedings had not been "*commenced before the expiration of one year from the date on which the cause of action accrued*" i.e., the date of the tort. [Emphasis added.]

And, as the facts continue to relate:

The trial judge found that the public authority was one-third and the company two-thirds responsible for the damage suffered. He gave judgment for the injured man against the company but held that his action against the public authority failed because it was statute barred. On the claim of the company to recover from the public authority one-third of the damages awarded:

² 67 Harvard Law Review 896 (1954), citing as examples of possible problems, D.C. Code (1951 ed.), § 12-208 (notice to municipality); and Federal Employers Liability Act, 53 Stat. 1404 (1939), 45 U.S.C. § 56 (1946) (three years), as opposed to shorter state statutes.

HELD (*per* Viscount Simonds, Lord Reid and Lord Tucker; Lord Porter and Lord Keith of Avonholm dissenting), that the company was not entitled under section 6(1)(c) of the Act of 1935 to recover contribution from the public authority.

Per Viscount Simonds and Lord Tucker. Section 6(1)(c) does not admit a claim for contribution by one tortfeasor against another where that other has been sued by the injured party and found not liable.

A reading of this case, along with the opinion on the lower appellate proceedings, reveals that most if not all of the arguments advanced in the instant case by Keleket were ably presented and fully considered by the courts in England, including the House of Lords. Nevertheless, the action for contribution was held barred. See for example the statement of Viscount Simonds (*Id.*, p. 179):

* * * If the intention had been to include a third class of persons who, having been already sued and found not liable, might yet by hypothetical proceedings be sued a second time and then found liable (an extravagant intention as it appears to me, to impute to the legislature) I should have expected to find it expressed in clear and appropriate language. Not only is it not so expressed, but on the contrary I find in the words actually used the clear indication that the class of persons "if sued would have been liable" does not include persons who, having been sued have been held not liable. As Morris, L.J. aptly put it, the words "if sued" postulate the case of someone who has not been sued. (Footnote omitted.)

Lord Reid stated (*Id.* p. 191):³

* * * In such cases it is, I think, right to hold that, if the arguments are fairly evenly balanced, that in-

³It is to be noted that prior to *Wimpey*, Larson in "A Problem in Contribution: The Tortfeasor With an Individual Defense Against the Injured Party" 1940 Wisconsin Law Review 467-502, at 483, after a comprehensive discussion of the problem of limitations gives a mere "slight edge in favor of the probability that contribution would be allowed".

terpretation should be chosen which involves the last alteration of the existing law. If the appellants are right the effect of section 21 of the Limitation Act, 1939, would be considerably modified but that is not so if the respondents are right. * * *

And Lord Tucker, in voting to dismiss the appeal stated, *inter alia*, as follows (Id. p. 192):

* * * It is to be remembered that this Act is giving to the claimant a new cause of action against the contributor which did not previously exist, and it would, in my view, require very clear language to lead to the conclusion that in addition to the categories consisting of (1) those sued and held liable, and (2) those not sued but who, if sued, would have been held liable, there is to be added a third class consisting of those who have been sued and held not liable but who may now be proved liable in further proceedings. * * *

Although it may be stated that the *Wimpey* case concerned a matter of statutory construction,⁴ the decision of the House of Lords has direct application to *Keleket's* case. In the first place, *Wimpey* involved the precise situation where different periods of statutory limitations applied to different tortfeasors concerned with the same damage. Secondly, contribution was granted by statute⁵ thereby presenting an easier case for

⁴ See "Limitations of Claims to Contribution Between Tortfeasors", 103 Law J. 211-212. See also Clerk and Lindsell on Torts, 11th Ed. (1959), Section 14, Joint Tortfeasors, § 176 et seq., at p. 111, citing the opinion of Singleton and Morris, L.J.J., for the proposition that "similarly, if one of the tortfeasors raises a successful defense to the plaintiff's claim under the Limitation Act, 1939, the other tortfeasor can recover no contribution from him."

Although no mention of an amendment to the Limitation Act, 1939, is made by the House of Lords in *Wimpey*, it might appear that a statutory remedy is now afforded in England. See Clerk and Lindsell, p. 111 note (e), and §§ 398-400, p. 258. If this be so, *Keleket's* remedy in the instant case must come from the same source.

⁵ For the convenience of the Court, the pertinent statute is set forth in the appendix hereto. Section 6(1)(c) reads in pertinent part: "any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damages, whether as a joint tortfeasor or otherwise." This is a strongly worded enactment. Notwithstanding, the claim for contribution

the claimant *Wimpey* than is afforded *Keleket* whose claimed right is a mere privilege declared in court opinions based on varying facts. Thirdly, the wording in the Limitation Act, 1939, and 28 U.S.C. § 2401(b) is, for practical and legal matters, the same.* Fourthly, the *Wimpey* case is stronger than is necessary here in demonstrating that a "private person, would (not) be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(2)(b) (parentheses added), and that a private individual "in the manner and to the same extent" (28 U.S.C. § 2674) would not be liable on *Keleket's* cross-claim. This is true because *Wimpey* does not place emphasis on the waiver of sovereign immunity.[†] The House of Lords treated the issues as if there is mere a conflict in statutes of limitations, and not on any idea that it was the Crown that possessed a seeming advantage in the bar to suits. As will be noticed herein, there can exist many instances when this situation could arise between private parties. Should such be the case in England, *Wimpey* would control. And *Wimpey* would apply with equal vigor if the government were involved. There should be no doubt, as the balance of this brief will demonstrate, but that this Court adhere to the same principles in the instant case.

II. The cross-claim is fatally defective

A study of the pertinent cross-claim herein (J.A. 9-10), reveals that it fails to comply with any applicable standard of pleading. It is stated that the accident allegedly occurred in a hospital "owned, operated and controlled by the United States", and that if the plaintiff was injured such injuries "were caused by the sole or contributory negligence of the United States * * *". It is further alleged that *Keleket's* liability "will have been caused in whole or in part by the aforesaid

was barred. *Keleket's* claim must also fail because it cannot show that the Government, or a private individual so situated, "is or may be" liable to it.

* See 36 Stat. 1093; 60 Stat. 842, 845; 62 Stat. 971; 63 Stat. 62.

† See *Feres v. United States*, 340 U.S. 135 at 140 (1950), wherein the English consent statute is discussed.

* It is difficult to ascertain how a cross-claimed defendant can be contributorily negligent. This aspect of tort law appears to be reserved for the plaintiff.

negligence and carelessness of the United States * * * and by the failure of the United States to employ suitable measures to avoid this accident." Keleket asked for judgment against the United States for "all or a contributable portion of any sums" which Keleket may pay, having stated that the United States "is or may be liable over to" Keleket.*

Doubtless pleading under the Federal Rules allows for the liberal approach. Nevertheless, in the fluid and flexible field of cross-claims, contribution, and indemnity, the cross-claimant must state a claim upon which relief may be granted. Bare-bones allegations will not suffice. Here, there is no allegation of indemnification or indemnity. Nor is there any allegation of joint (or even concurrent) tortfeasorship. Weepy phrases that another is or may be liable do not comprise a "short and plain statement of the claim showing that the pleader is entitled to relief" (Rule 8(a), F.R.C.P.). Keleket should have alleged statements indicating its claim of indemnity, if such be the basis of its claim. And, if it claims contribution, it must acknowledge the fact that it is a joint tortfeasor. As indicated herein, there is a difference between these two legal concepts and Keleket has failed to state a claim under either. Therefore, the order dismissing the complaint may be sustained on the ground that the cross-claim failed to state a claim upon which relief could be granted. (J.A. 10-11, 21-22.) *Washington Building Realty Corporation v. Peoples Drug Stores*, 82 U.S. App. D.C. 119, 161 F. 2d 879 (1947); *Mijon v. Acquire*, 144 A. 2d 161, 167-169, 51 N.J. Super. 426 (1958); *Gartner v. Lombard Bros.*, 197 F. 2d 53, 55 (3rd Cir. 1952). See also *Tessier v. United States*, 269 F. 2d 305, 310-311 (1st Cir. 1959). Compare the allegations in the instant cross-claim with the statement of facts contained in *Coates v. Potomac Electric Power Co.*, 96 F. Supp. 1019 (D.C.D.C. 1951) (App. Br. p. 12).

III. Indemnity and contribution are different

Although Keleket did not allege indemnity or contribution in the cross-claim, it now seeks to claim relief under both prin-

* The statutory provisions applicable to tort claims against the United States are: 28 U.S.C. §§ 1346(b), 1402(b), 1491, 1504, 2110, 2401(b), 2402.

ciples and not merely under the doctrine of contribution. Throughout the brief Keleket attempts to equate the two theories.¹⁰ However, a review of the cases clearly demonstrates that there can be no confusion as to terms herein. Indemnity is not contribution and a clearer understanding of these concepts will alleviate many of the difficulties encountered when Keleket's brief is first considered.

In *Thomas v. Malco Refineries*, 214 F. 2d 884, 885 (10th Cir. 1954) (App. Br. p. 10), it is stated:

There are important and substantial distinctions between the right to contribution and the right to indemnity. Indemnity springs from a contract, express or implied, and enforces a duty on the primary or principal wrongdoer to respond for all the damages. On the other hand, contribution does not arise out of contract, but is an obligation imposed by law and rests on the principle that when the parties stand in *aequali jure*, the law requires equality, and that all should contribute equally to the discharge of the common liability. (Citing, *inter alia*, *George's Radio v. Capital Transit Co.*, 75 U.S. App. D.C. 187, 126 F. 2d 219, 222 (1942).)

See also: *Vickers Petroleum Co. v. Biffle*, 239 F. 2d 602, 606 (10th Cir. 1956) (App. Br. p. 10); and *D.C. Transit System, Inc. v. Slingland*, — U.S. App. D.C. —, 266 F. 2d 465, 467 (1959) (App. Br. pp. 10, 11).

The opinion of this Court in *George's Radio* cited in the *Thomas* case stated (75 U.S. App. D.C. at 190):

¹⁰ A perusal of some of the cases cited by appellant herein reveals the "indemnity" and contractual basis for the action. E.g. *Hidick v. Orion Shipping & Trading Co.*, 157 F. Supp. 477 (D.C.S.D. N.Y. 1957) (App. Br. pp. 13, 14, 15, 16, 18, 22) (charter-contract, pp. 483, 484); *Dament v. A/B Inger*, 153 F. Supp. 600, 604 (D.C.E.D. N.Y. 1957) (App. Br. p. 23) ("contractual basis of certain provisions in the time charter" "the status of the ship's captain", and "certain provisions of a stevedoring contract"); *James McWilliams Blue Line v. Esso Standard Oil Co.*, 123 F. Supp. 824 (D.C.S.D. N.Y. 1954) (App. Br. p. 14) (time charter contract); *Northwest Airlines v. Glenn L. Martin Company*, 161 F. Supp. 452 (D.C. Md. 1958) (App. Br. 14) (manufacturer's contract); *Sabat v. Pennsylvania Railroad Company*, 157 F. Supp. 325 (D.C.E.D. N.Y. 1958) (App. Br. pp. 7, 14, 15, 16, 17, 19, 22) (denial of motion to dismiss without prejudice to showing of true relationship of the parties).

* * * This we say on the assumption that there is a manifest distinction, though at times lost sight of, between suits in contribution and suits in indemnity * * * The difference between indemnity and contribution—in cases between persons liable for a wrong—is that in the former the law implies an agreement or obligation and enforces a duty on the primary or principal wrongdoer to respond for all the damages, whereas in the latter, there is no agreement, express or implied, but a common burden in which the parties stand in equali juri and which in equity and good conscience should be equally borne. This maxim has its parallel in the admiralty rule of "general average"; that what is given for the general benefit of all, should be made good by contribution of all in proportion to the respective interests. * * *

In attempting to overcome the impact of these principles, Keleket heavily relies upon *The Chicago, Rock Island and Pacific Railway Company v. United States*, 220 F. 2d 939 (7th Cir. 1955). Such case clearly involves indemnity. There an employee of the railway was struck by a mail pouch thrown from the mail car of a passing train and sustained serious injuries. Ten days later the company notified the United States that the injury was the result of the negligence of employees of the United States. The liability of the railroad was fixed by statute. 45 U.S.C. § 51 (Every common carrier by railroad * * * shall be liable in damages to any person * * * employed * * *) Settlement was made by the railroad with its employee and four and one-half years after the injury but within two years of settlement, the railroad brought an action for money damages for loss of property. See 122 F. Supp. 368 at 370. On appeal, the court stated that it " * * * need not be too much concerned, however, as to whether the cited cases of the Supreme Court are by analogy controlling here because of the great weight of authority adverse to the government's contention, under facts quite similar to those here." (*Id.* p. 940), citing, *inter alia*, *St. Louis-San Francisco Ry. Co. v. United States*, 187 F. 2d 925 (5th Cir. 1951) (shipment of poisonous gas bombs; indemnity clearly shown); and *United*

States v. Chicago R.I. & P. Ry. Co., 171 F. 2d 377 (10th Cir. 1949) (railroad under military control; indemnity or subrogation theory advanced; no question of limitations or jurisdiction raised other than applicability of Federal Tort Claims Act).¹¹

The Court of Appeals for the Seventh Circuit, in considering such manifest case for indemnity held that the action was not barred by the statute of limitations, having been commenced within two years after settlement with the employee was made by the railroad.¹² Keleket cannot show how this is its case, because it cannot claim that it is one of those "innocent bystanders upon whom the loss from tortious conduct has ricocheted and by operation of law (has) claims against the tortfeasor." (*Terminal R. Ass'n of St. Louis v. United States*, 182 F. 2d 149 (8th Cir. 1950)) (dissent, at p. 152).

If the instant case be that of indemnity Keleket would have to plead and prove a contract "express or implied" with the United States. 28 U.S.C. § 1346(a)(2). This would not be a claim tantamount to that specifically stated and reserved

¹¹ But see *Terminal R. Ass'n of St. Louis v. United States*, 182 F. 2d 149 (8th Cir. 1950), also cited by the Seventh Circuit. There the railroad was in the control of the military and injury was had in 1943. Settlement was made in 1949 and the action instigated in 1949. On appeal, dismissal of the complaint for want of jurisdiction was affirmed. Keleket's case is to be controlled by this decision of the Eighth Circuit. That the *Chicago, Rock Island and Pacific* case is to be limited exclusively to indemnity cases with the complete shifting of loss is seen by *Mangone v. Moore-McCormack*, 152 F. Supp. 849, 850, 851, 855 (D.C.E.D.N.Y. 1957); *Sabat v. Pennsylvania Ry.*, 157 F. Supp. 325, 327 (D.C.E.D.Pa. 1958); *Hidick v. Orion Shipping & Trading Co.*, 157 F. Supp. 477, 488 (D.C.S.D.N.Y. 1958); *Lilleberg v. Pacific Far East Line, Inc.*, 167 F. Supp. 3, 5 (D.C.N.D. Calif. 1958); and *Gulf, Colorado & Santa Fe Railway Co. v. McBride*, 322 S.W. 2d 492, 496, 498 (Texas 1957). Otherwise, we submit that the opinion of the Seventh Circuit is wrong, as is *Schott v. Colonial Baking Co.*, 111 F. Supp. 18 (D.C.W.D. Ark. 1953), to which Keleket does not refer.

¹² The legislative history alluded to in the opinion includes: Hearings before Subcommittee No. 1 of the House Judiciary Committee on H.R. 7236 76 Cong. 3d Sess., 21; H.R. 7236, 76 Cong., 3 Sess. 21; H. Rep. 1754, 8th Cong., 2d Sess. 2. It is shown therein that the Congress fixed a short period of time so that the Government would not be harassed by silent suits. No direct history on the word "accrue" has been found but, as reference has been previously made, this word has appeared in all of the consent statutes. In any event, notice that the same wording is present in the English statute as construed in the *Wimpey* case, *supra*.

for the jurisdiction of the District courts in section 1346(b). It would be a separate action and, under the law, would have to be an express contract or a contract implied in fact. This is true because as was pointed out below (J.A. 18), the waiver of sovereign immunity does not extend to contracts implied in law. *Merritt v. United States*, 267 U.S. 338 (1925); *United States v. Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926); *Alliance Assurance Co. v. United States*, 252 F. 2d 529, 532 (2nd Cir. 1958); and *Manufacturers Aircraft Assn. v. United States*, 77 Ct. Cls. 481, 519 (1933). See also *Mangone v. Moore-McCormack Lines*, 152 F. Supp. 848, 852 (D.C.E.D.N.Y. 1957). In any event, the law could not imply a contract under the Federal Tort Claims Act when the United States is not and cannot be liable to the primary complainant.¹³ This is especially true here where the cross-claim does not make out an indemnity case.

As noted, this jurisdiction has recognized the distinction between the two doctrines and a study of the cases reveals that whereas contribution has been expanded, indemnity has been restricted. The typical case involves allegations of negligence on the part of both alleged tortfeasors. *George's Radio, supra*; *Knell v. Feltman*, 85 U.S. App. D.C. 22, 174 F. 2d 662 (1949); Note, 45 Harvard L. Review 349.¹⁴ That the instant case involves contribution, see *United States v. Yellow Cab*, 340 U.S. at 545 (statement of facts in No. 204).

¹³ Compare the specific language in sections 1346(b), 1402(b), 2401(b) and 2674, with section 1346(a) (2) and 2401(a), indicating that tort claims are not to be equated with contract claims.

¹⁴ For additional cases in this jurisdiction dealing with contribution see: *David v. District of Columbia*, 88 U.S. App. D.C. 92, 187 F. 2d 204 (1950); *Capital Transit Co. v. District of Columbia*, 96 U.S. App. D.C. 199, 225 F. 2d 38 (1955); *District of Columbia v. Vignar*, 79 U.S. App. D.C. 188, 144 F. 2d 641, (1944), cert. denied, 323 U.S. 781; *McKenna v. Austin*, 77 U.S. App. D.C. 228, 134 F. 2d 659, 148 A.L.R. 1253 (1943); *Curtis v. Welker*, 54 App. D.C. 272, 296 Fed. 1019 (1924); *Atchison v. Wills*, 21 App. D.C. 548, 561 (1908); *Warner v. Capital Transit Company*, 162 F. Supp. 253, 255 (D.C.D.C. 1958); *Ottenstein v. Julius Garfinkel & Co.*, 151 A. 2d 925, 927 (Mun. Ct. App. 1959); *Hodges v. United States Fidelity & Guaranty Co.*, 91 A. 2d 473 (Mun. Ct. App. 1952); *Peake v. Ramsey*, 43 A. 2d 763, 766 (Mun. Ct. App. 1945).

As it has been succinctly stated (28 Temple Law Quarterly 303, 305 (1951):¹⁵

The crux of the doctrine of contribution is the existence of a common obligation to the person injured by the common tortious conduct. Fault alone is not enough, there must be joint liability to respond to the injured person in damages for the consequences of the default. [Footnotes and citations omitted.]

See also *Zontelli Brothers v. Northern Pacific Railway Co.*, 263 F. 2d 194 (8th Cir. 1959) ("common liability"), and *Wilson v. Massatee*, 32 S.E. 2d 335, 224 N.C. 705 (1944).

This Court has ruled precisely on this requirement. In *Yellow Cab Co. of D.C. v. Dreslin*, 86 U.S. App. D.C. 327, 328, 181 F. 2d 626, 19 A.L.R. 2d 1001 (1950), it is stated:¹⁶

The right of contribution arises out of a common liability. The rule "hinges on the doctrine that general principles of justice require that in the case of a common obligation the discharge of it by one of the obligors without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled." *George's Radio, Inc. v. Capital Transit Co.*, 1942, 75 U.S. App. D.C. 187, 189, 126 F. 2d 219, 221. *Contribution, then depends upon joint liability.* An injured party plaintiff in the suit from which a right of contribution develops must have had a cause of action against the party from whom contribution is sought. Here there was no liability by Dreslin to his wife—no right to action against him *and the Cab Co.*, hence nothing to which a right of contribution could attain. (Emphasis added.)

See also *Yellow Cab Co. of D.C. v. Janson*, 86 U.S. App. D.C. 38, 39, 179 F. 2d 54 (1949).

Thus, there must be a "common obligation" in cases involving joint tortfeasors. Section 2674 states that the United

¹⁵ This answers appellant's argument (Br. p. 11).

¹⁶ Appellant seeks to distinguish *Dreslin* (Br. p. 20-21), in effect stating that the Supreme Court, in *Yellow Cab* does permit "a cause of action" against the Government for contribution. This does not, however, obliterate this Court's holding that there must be "joint liability".

States "shall be liable, respecting * * * tort claims * * * in the same manner and to the same extent as a private individual under like circumstances * * *" To this Keleket states (Br. p. 9):

* * * If a private individual in the District of Columbia would be required to respond to the claim herein asserted the United States must also be required to respond. Clearly, if the local law recognizes a cause of action for indemnity or contribution under the circumstances which are presented in the instant action, the United States is subject to suit.

The difficulty with this statement is that it is self-serving. Recognition of a cause of action does not mean that such cause shall be, in every instance available. Keleket can point to no case which specifically holds that where two different statutes of limitation are involved, the law will apply the one and totally disregard the other.¹⁷ Cases come to the courts on facts limited only by the imagination of the litigants and by the axiom that "truth is stranger than fiction". Nevertheless, it can be seen that P could sue D-1 and D-2 two years after personal injury. If D-2 could show that the one year statute applied as to him, a cross-claim filed by D-1 would fail. Dis-

¹⁷ For examples of statutes of limitation in the District of Columbia see: § 1-804, one year on bonds of contractors, laborers, etc.; § 11-718, judgments to be effective for six years; § 12-201, recovery of lands, tenements, or hereditaments (15 years); bond of executor or administrator (5 years); instrument under seal (12 years); simple contract, damages to real or personal property or recovery of personal property (3 years); libel, slander, assault, battery, mayhem, wounding, amlicious prosecution, false arrest, or false imprisonment (1 year); all other unprescribed actions (3 years). § 12-208, unliquidated damages against the District of Columbia, report must be made within six months. § 13-217, in impleader action, third party must appear within a "reasonable time"; § 15-101, execution on final judgments (1 year); § 15-102, expiration of final judgments (12 years); § 16-702, suit to recover gaming losses (3 months); § 16-703, suit to recover fraudulent gaming losses (6 months); § 16-1202, wrongful death (1 year); § 16-1501, adverse possession, in general (22 years); § 16-1611, suit for damages after quo warranto (1 year); § 28-2704, usury (1 year); § 38-115, mechanic's lien (1 year); § 38-303, hospital lien (1 year); § 44-404, suit against common carrier employer (1 year); § 45-1405, suit on surety's bond (1 year).

trict of Columbia Code (1951 ed.) § 12-201. Similar facts could be presented under sections 16-702 and 16-703; and 12-201 and 16-1202; and other possible combinations. Because the instant case does not involve defendants who are bound by identical statutes of limitations, the ordinary decisions do not control, the usual Federal Rules do not apply, and Keleket cannot blandly state that contribution is open to it.

Another aspect of the local statutes bears scrutiny. It cannot be denied that notice to the District of Columbia Government is an absolute prerequisite to suit.²⁸ *Stone v. District of Columbia*, 99 U.S. App. D.C. 32, 237 F. 2d 28 (1956), cert. denied, 77 S. Ct. 221; *McDonald v. Government of the District of Columbia*, 95 U.S. App. D.C. 305, 221 F. 2d 860 (1955); *Lake v. District of Columbia*, 63 App. D.C. 306, 72 F. 2d 174 (1934); *District of Columbia v. Stone*, 112 A. 2d 497 (Mun. Ct. App. D.C. 1955); *District of Columbia v. World Fire & Marine Ins. Co.*, 68 A. 2d 222 (Mun. Ct. App. D.C. 1949). See also *National Lead Co. v. City of New York*, 43 F. 2d 914, 916 (2d Cir. 1930); and 3 A.L.R. 2d 704. All manner of problems as pertains to the instant issues are presented by these cases.

A review of the cases and the statutes demonstrates the fact that the supreme Court in *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951), did not provide Keleket with the open-ended remedy for contribution it now claims to possess. For example, see *Sappington v. Barrett*, 86 U.S. App. D.C. 334, 132 F. 2d 102 (1950), and *United States v. Gilman*, 347 U.S. 507 (1954).

²⁸ Actions against the District of Columbia for unliquidated damages are controlled by 12 D.C. Code (1951 Ed.), § 12-208: "No action shall be maintained against the District of Columbia for unliquidated damages to person or property unless the claimant within six months after the injury or damage was sustained, he, his agent, or attorney gave notice in writing to the commissioners of the District of Columbia of the approximate time, place, cause, and circumstances of such injury or damage: *Provided, however*, That a report in writing by the Metropolitan police department, in regular course of duty, shall be regarded as a sufficient notice under the above provision." See also 1 D.C. Code § 902.

IV. Contribution is not a matter of right

The mere fact that a suit is instituted does not confer jurisdiction or vest a right in the claimant or the cross-claimant.²⁰ See *Maryland Cas. Co. v. Employees Mut. Liability Ins. Co.*, 208 F. 2d 731, 733 (2d Cir. 1953).²¹ This is true because "The jurisdiction of the ancillary suit or proceeding is referable to or dependent upon the jurisdiction of the court over the principle suit or proceedings." *United States v. Acord*, 209 F. 2d 709, 712 (10th Cir. 1954), cert. denied, 347 U.S. 975.²² These principals have been applied to actions under the Federal Tort Claims Act. *Morgan v. United States*, 143 F. Supp. 580 (D.C.N.J. 1956).

A defendant cannot change the action of the plaintiff from one against it to one against someone else. If the plaintiff's case for negligence stands, it is not to be defeated by the fact that others may also be liable had the plaintiff sued them. "It is no defense for one tort-feasor to say that someone else was a wrongdoer too." *Gartner v. Lombard Bros.*, 197 F. 2d 53, 54-55 (3rd Cir. 1952) (citing Restatement of Torts, § 875, 882; Prosser on Torts, p. 1101).²³

²⁰ Plaintiff's course of action does not toll the statute of limitations. *New York and Cuba Mail Steamship Co. v. United States*, 172 F. Supp. 684 (Ct. Cls. 1959). See for example, *Bray v. Gross*, 108 A. 2d 850, 16 N.J. 382 (1954). Dismissal there of the complaint as to D-2 was fatal to D-1's claim, when no cross-claim had been filed.

²¹ For cases dealing with cross-claims in general see: *Hoosier Gas v. Fox*, 102 F. Supp. 214, 229 (D.C.N.D. Iowa 1952); *Great Lakes Auto Ins. Group of Chicago, Ill. v. Shepherd*, 95 F. Supp. 1, 4 (D.C.W.D. Ark. 1951); *Bohn v. American Export Lines*, 42 F. Supp. 228 (D.C.S.D.N.Y. 1941); See also: *Falls Industries, Inc. v. Consolidated Chem. Indus. Inc.*, 258 F. 2d 277 (5th Cir. 1958); *United States v. Lusdough*, 200 F. 2d 717 (8th Cir. 1952).

²² For purposes of jurisdictional amount, cross-claims "are regarded as ancillary to the principal claim." The true ancillary nature of a cross-claim is tested by the fact that "Rule 13(g) neither extends or limits the jurisdiction of the Federal Court * * *". *Coastal Air Lines v. Dockery*, 180 F. 2d 874, 877 (8th Cir. 1950). See also *United States v. Hosteen Tse-Kesi*, 191 F. 2d 518, 521 (10th Cir. 1951); *Invest-Import v. Seaboard Surety Company*, 18 F.R.D. 499 (D.C.S.D.N.Y. 1955); and *Southwest Lime Co. v. Lindley*, 12 F.R.D. 484 (D.C.W.D. Ark. 1952).

²³ *Henry Fuel Co. v. Whitebread*, 99 U.S. App. D.C. 9, 236 F. 2d 742 (1956), upon which appellant heavily relies (Br. pp. 6, 10, 11, 12, 18, 19, 20, 24), is not in point. A like situation would involve 28 U.S.C. § 2673 or § 2677 and not the statute of limitations section 28 U.S.C. § 2401. There is a substantial difference between the United States defending on the ground that it has

Thus, in an action involving impleader by an escrow holder of money against an individual and a non-appearing corporation, the court held that the individual was not entitled under the federal rules to maintain a cross-claim against the corporation for money damages allegedly arising out of the same transaction. *Hagan v. Central Avenue Dairy*, 18 F. 2d 502, 503 (9th Cir. 1950). See also 17 A.L.R. 2d 735. There the court stated:

There is no use in talking about how an action is to be conducted unless a court has jurisdiction of the person and competency as to the subject-matter.

There is no doubt but that the Federal Rules of Civil Procedure apply to the United States. *Mosseller v. United States*, 158 F. 2d 380, 382 (2nd Cir. 1946). Therefore, all cross-claims against it must be filed pursuant to the rules. See also Rule 81(e), F.R.C.P.; and *United States v. Reynolds*, 345 U.S. 1 (1953).²³

In *Pierce v. Perlite Aggregates*, 110 F. Supp. 684, 687 (D.C. N.D. Calif. 1952), the court stated:

settled its case (thereby admitting liability) and defending on the ground that the claim against it, being forever barred, cannot be manipulated into "common liability". And see *Rushford v. United States*, 204 F. 2d 831 (2nd Cir. 1953) (App. Br. p. 22); and *Southern Pacific Co. v. Raish*, 205 F. 2d 389 393 (9th Cir. 1953) (App. Br. p. 22), wherein it is stated: "It follows that as long as the cause of action survives, there is no cause for complaint by one sued simply because an alleged joint tortfeasor is not sued."

²³ Cross-claims shall be pursued in accordance with Rules 7(a), 8(a), 13(g), 13(h), 18(a), 22(1), 41(c), 42(b), 54(b), 55(d), 56(d), 56(b).

Third-party practice is governed by Rules 13(h), 14(a), 14(b), 18(a).

Joinder is controlled by Rules 19, 20, 21. Interpleader and Intervention are established by Rules 22 and 24.

Service of process of the cross-claim against the United States should be in accordance with Rule 5. See also Rules 4(d) (4) (5). Rule 12(b) permits the United States to answer the cross-claim within sixty days after service.

Rule 8(e) (2) permits the party to claim or defend alternately or hypothetically, regardless of consistency. Rule 13(g) states that: " * * * such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

Rule 13(f) allows separate trials and separate judgments. Rule 42(b) allows separate trials on cross-claims, etc.

Pursuant to Rule 41(c), Rules 41 (a) and (b) apply to the dismissal of the cross-claim by the court.

Ordinarily, when the original claim in connection with which a cross-claim arises is dismissed for lack of jurisdiction, the dismissal carries with it the cross-action.

And the court cited 3 Moore's Federal Practice, 2d Ed., Section 13.36, p. 98, for that: "an exception, however, occurs where the cross-claim is supported by 'independent jurisdictional grounds' ". See also *Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co.*, 206 F. 2d 336 (9th Cir. 1953), *cert. denied*, 346 U.S. 899, wherein it is stated:

Compulsory counterclaims are required to be dismissed only when the complaint is dismissed for want of jurisdiction, which is not the case here.

In this connection, courts have repeatedly held that cross-suits against the United States are barred without its consent. *United States v. Shaw*, 309 U.S. 495 (1940); *United States v. Wilkes-Barre Transit Corp.*, 143 F. Supp. 413 (D.C.M.D. Pa. 1956).²⁴

Thus, under these principles and these cases, Keleket's problem can be faced in the present action as well as if an independent action were brought after judgment in favor of the plaintiff. In other words, the defense of the United States is equally applicable in a cross-claim action and in an independent or separate action for contribution.²⁵ (App. Br. p. 13.) It is no answer to state, as Keleket does, that normally the claim accrues and statute begins to run at the time of a disproportionate payment. These principles come into play when the same statute applies as to all defendants. That is not this case. Congress did not extend a "claim" which can accrue on the facts of Keleket's cross-claim. In essence, Keleket's claim is

²⁴ See also: *United States v. Bristow*, 142 F. Supp. 601 (D.C.E.D. Va. 1956); *United States v. State Bridge Commission of Michigan*, 109 F. Supp. 690, 695 (D.C.E.D. Mich. 1953); *Bowles v. Crew*, 59 F. Supp. 809, 810 (D.C.S.D. Calif. 1945); *United States v. Great Northern Ry. Co.*, 32 F. Supp. 651, 656 (D.C. Mont. 1940). *United States v. Capital Transit Co.*, 108 F. Supp. 348 (D.C.D.C. 1952); and *United States v. Shainfne*, 151 F. Supp. 586 (D.C.E.D. Pa. 1957), appear to stand alone and to be unwarranted extensions of waiver of immunity. See the *Shaw* case, *supra*.

²⁵ It is to be noted that the express disability provision in section 2401(a) is omitted from section 2401(b). And it has been held that these sections are mutually exclusive, so that tolling for disability does not apply in tort claims cases. *United States v. Glenn*, 231 F. 2d 884 (9th Cir. 1956).

similar to a case where (absent a survival statute) one defendant attempted to cross-claim or bring a separate action against a deceased co-defendant or alleged joint tortfeasor for contribution.²⁶ In this situation, death would be fatal to both defendants.²⁷ And if the one defendant has a common liability, i.e., is responsible completely for the injury to the plaintiff, there is no inequity to him if as a joint tortfeasor he cannot claim contribution from the other tortfeasor.²⁸ This is true whether contribution is defeated as a matter of fact or as a matter of law.

This means that it is necessary to study the jurisdictional aspect of the Federal Rules permitting cross-claims. In particular see the following two rules:

RULE 13(d) COUNTERCLAIM AGAINST THE UNITED STATES. These rules shall not be construed to enlarge beyond the limits now fixed law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

* * * * *

RULE 82. JURISDICTION AND VENUE UNAFFECTED. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

²⁶ See Rule 25(a) (1) death of a party causes dismissal under certain conditions. Under Rule 25(a) (2), the death of one defendant is merely suggested upon the record and the action "shall proceed in favor of or against the surviving parties."

Also see Rule 25(d), wherein the rules affecting the substitution of public officers are mentioned. *Snyder v. Buck*, 340 U.S. 15 (1950); *Almour v. Pace*, 90 U.S. App. D.C. 63, 193 F. 2d 699 (1951). See also: *Bowles v. Wilke*, 175 F. 2d 35 (7th Cir. 1949), *cert. denied*, 338 U.S. 861; *Fleming v. Sebastiani*, 161 F. 2d 111 (9th Cir. 1947); and *Anderson v. Yungkau*, 329 U.S. 482 (1947). However, see 28 U.S.C. § 2404.

²⁷ Consider, for example, the tolling of the statute of limitations by the absence of a defendant from the jurisdiction. D.C. Code § 12-205. Adoption of appellant's theory would lead to the inevitable result that the United States, or a private individual, could be brought in by a cross-claim in an action brought ten, twenty or thirty years after the injury. Had Congress intended this inequitable and harsh result, it would have so stated. Certainly, under section 205, the cross-claimed party could say with assurance that the absent or concealed defendant's claim that he "is or may be liable" (Rule 13(g)), must fail.

²⁸ See the statement of Lord Tucker in the *Wimpey* case, which statement is set out hereinabove.

These rules mean that, as in the case of filing a principal claim,²⁸ the mere filing of a cross-claim does not create jurisdiction nor vest rights in the cross-claimant. A study of pertinent cases reveals that contribution is not a matter of right.²⁹ Nor is the mere assertion of the privilege tantamount to a positive claim to it. Courts have held that there can be no contribution as a matter of law. *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406, 408 (1953) (workmen's compensation); *Johansen v. United States*, 343 U.S. 427 (1952) (Federal Employees Compensation Act); *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952) (maritime law); *Keffer v. Capital Transit*, 87 U.S. App. D.C. 13, 183 F. 2d 808 (1950) (workmen's compensation laws); *Yellow Cab of D.C. v. Dreslin*, 86 U.S. App. D.C. 327, 181 F. 2d 616 (1950) (husband and wife); *Yellow Cab Co. of D.C. v. Janson*, 86 U.S. App. D.C. 38, 179 F. 2d 54 (1949) (res judicata); *United States v. State of Arizona*, 214 F. 2d 389 (9th Cir. 1954) (state law); *Peak Drilling Co. v. Halliburton Oil Well Cementing Co.*, 215 F. 2d 368 (10th Cir. 1954) (workmen's compensation); *American Mut. Liability Ins. Co. v. Matthews*, 182 F. 2d 322 (2nd Cir. 1950) (workmen's compensation); *Lo Bu v. United States*, 188 F. 2d 800 (2nd Cir. 1951) (workmen's compensation); *Slattery v. Marra Bros.*, 186 F. 2d 134 (2nd Cir. 1951) (workmen's compensation); *Drumgoole v. Virginia Electric & Power Co.*, 170 F. Supp. 824 (D.C.E.D. Va. 1959) (enlisted reserve person-

²⁸ For example Rule 4(d) (4) does not, per se, confer jurisdiction. However, the failure to comply with the rules is fatal. *Messenger v. United States*, 231 F. 2d 328 (2nd Cir. 1956); and see *United States v. Krasnov*, 109 F. Supp. 143, 147 (D.C.E.D. Pa. 1952).

²⁹ For cases dealing with the concept that causes of action must be based on statute, see: *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945); *R.F.C. v. Menihan Corp.*, 312 U.S. 81 (1941); *United States v. Michel*, 282 U.S. 656 (1931); *Davis v. L. L. Cohen Co.*, 268 U.S. 638 (1925); *United States v. Moreland*, 258 U.S. 433 (1922); *United States v. Martinez*, 184 U.S. 441 (1902); *Cobb v. Shore*, 87 U.S. App. D.C. 162, 183 F. 2d 980 (1950); *Fehlhaber Pile Co. v. Tennessee Valley Authority*, 81 U.S. App. D.C. 124, 155 F. 2d 864 (1946); *Wedster v. Clodfelter*, 76 U.S. App. D.C. 171, 130 F. 2d 434, 143 A.L.R. 280 (1942), cert. denied, 317 U.S. 689; *Shugard v. Hoag*, 67 App. D.C. 52, 54, 89 F. 2d 796 (1937); *Chapman v. Hoag*, 64 App. D.C. 349, 78 F. 2d 233 (1935); *Dierssen v. Woolever*, 3 F.R.D. 342 (D.C. Conn. 1944).

nel); ²¹ *Moretz v. General Electric Company*, 170 F. Supp., 698, 704 (D.C.W.D. Va. 1959) (workmen's compensation); *Panichella v. Pennsylvania Railroad Company*, 167 F. Supp. 345, 351-352 (D.C.W.D. Pa. 1958) (contributory negligence); *Baird v. John McShain, Inc.*, 108 F. Supp. 553, 555 (D.C.D.C. 1952) (workmen's compensation); *Bankers Indemnity Co. v. Clebeland H. & F. Co.*, 62 N.E. 2d 180 (Ohio 1945) (workmen's compensation); *Farren v. N.J. Turnpike Authority*, 106 A. 2d 752, 31 N.J. Super. 356 (1954) (workmen's compensation); *Wilson v. Massagree*, 32 S.E. 2d 335, 224 N.C. 705 (1944) (Federal Employers Liability Act). See also *Smither & Company, Inc. v. Coles*, 100 U.S. App. D.C. 68, 242 F. 2d 220 (1957), *cert. denied*, 354 U.S. 914.

In addition to these cases which hold that there can be no contribution as a matter of law, the exceptions to the Federal Tort Claims Act are to be noticed. Congress did not waive sovereign immunity to all tort cases nor did it open the cupboards of the federal treasury to tortfeasors who allege a right to redress under the Act (28 U.S.C. § 2680). There are specific and express provisions relating, *inter alia*, to "execution of a statute or regulation", "discretionary" "functions", postal, treasury and tax matters, admiralty,²² quarantine, activities of the Tennessee Valley Authority and the Panama Canal Company, claims arising in a foreign country,²³ combatant activities during time of war, and assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Surely, if these exceptions are the expression of the intent of Congress—as they must be interpreted—then the United States could not be jointly liable with any co-defendant in such

²¹ Reliance was had on *Feres v. United States*, 340 U.S. 135, 141, 142 (1950), wherein it was stated: "It will be seen that this is not the creation of new causes of action but acceptance of liability under circumstances that would bring a private liability into existence. * * * and not visit the Government with novel and unprecedented liabilities."

²² See *Mangone v. Moore-McCormack Lines*, 152 F. Supp. 848, 852 (D.C.E.L. N.Y. 1957) (App. Br. p. 23), wherein it was held that indemnity action must be brought in admiralty.

²³ *United States v. Spelar*, 338 U.S. 217 (1949).

cases. There could be no common liability as a matter of statutory enactment, just as there can be no common liability as a matter of law in the cases cited immediately above. And, if there is no common liability, there can be no contribution.

Congress indicated these exceptions by separate provisions. Likewise, by separate provision the legislators expressly enacted a tort claims statute of limitation and dictated that two years shall be the period. As a matter of law, then, there can be no common liability once the statute has expired. The *Yellow Cab* case is limited to the "circumstances of these cases" (340 U.S. at 552), and does not overcome the force of this argument. And once it is established that there can be no common liability, there can be no contribution.

This is not a charitable trust situation (*Mount Vernon Mortgage Corp. v. United States*, 98 U.S. App. D.C. 429, 430, 236 F. 2d 724 (1956)), nor is it suretyship (*Chapman v. Hoage*, 296 U.S. 526 (1936)). The action does not involve a continuing tort (*In re De's Estate*, 292 N.W. 513, 515, 293 Mich. 651 (1940)), or a criminal action (*Gilmore v. United States*, 129 F. 2d 199, 203 (10th Cir. 1942)). Furthermore, the law is well settled that an amendment to the pleadings will not serve to avoid a statute of limitations. See: *Kansas Gas & Electric Co. v. Evans*, 100 F. 2d 549, 552 (10th Cir. 1938), cert. denied, 306 U.S. 665; *Aarhus Oliefabrik, A/S v. A. O. Smith Corporation*, 22 F.R.D. 33 (D.C.E.D. Wisc. 1958); *Murfsan v. Kahn*, 11 F.R.D. 520 (D.C.S.D. Fla. 1951); *Anderson v. Brady*, 7 F.R.D. 84 (D.C./E.D. Ky. 1946). And, as is perhaps pertinent here, the statute will bar equitable relief in appropriate cases. *Troeger v. Fink*, 332 P. 2d 779, 783 (Calif. 1959).

Another illustration is in order. Should, for example, a party bring a tort action in a state court against D-1, the law seems clear that an attempt by D-1 to bring in the United States on a contribution theory would not warrant removal to a Federal Court. *Pullman Co. v. Jenkins*, 305 U.S. 543 (1939); *Cincinnati & Texas Pacific Ry. v. Bohon*, 200 U.S. 221 (1906).³⁴ Certainly, Congress did not intend that the United

³⁴ See also: *Texas Employers Ins. Ass'n v. Felt*, 150 F. 2d 227 (5th Cir. 1945); *Ammond v. Pennsylvania R. Co.*, 125 F. 2d 747 (6th Cir. 1942); *Tolbert v. Jackson*, 99 F. 2d 513 (5th Cir. 1958); *Manternach v. Jones*

States would be a proper party to a tort claim arising under State law and brought in a state court. See 28 U.S.C. § 1331, 1332, 1346, 1402. Thus, by statutory interpretation, an action against one defendant will not permit a cross-claim for contribution against the United States.²⁵

For as the Supreme Court stated in *United States v. U.S. Fidelity Co.*, 309 U.S. 506, 513 (1940):

* * * The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. * * *

See also *United States v. Shaw*, 309 U.S. 495 (1940).

Appellant laments that the plaintiff is a given case and in this case should not be permitted to control the litigation and the rights of the parties (E.g. Br. pp. 20-21). At first blush, this observation warrants thought. However, it must be remembered that this case concerns the consent of the sovereign to be sued in tort. Hence it is readily apparent that the actions of defendant will have effect upon the rights of the United States and this, we submit, is not what Congress intended when it passed the Federal Tort Claims Act. For example, a private defendant can waive the statute of limitations

County Farm Service Company, 158 F. Supp. 574, 577 (D.C.N.D. Iowa, 1957); *Henry v. Rice*, 74 F. Supp. 222 (D.C.E.D. Mo. 1947); *Barwick 1. Pratt*, 52 F. Supp. 262 (D.C.E.D.S.C. 1943); *May v. George A. Rheman Co.*, 51 F. Supp. 426 (D.C.S.D. Ga. 1943); *Johnson v. Jordan*, 22 F. Supp. 286 (D.C.E.D. Okla. 1938); *Smith v. McDowell Furniture Co.* 16 S.E. 2d 685, 686, 220 N. C. 155 (1941); *Southern Ry. Co. v. Smith*, 191 S.E. 181, 182, 55 Ga. App. 689 (1937).

"* * * It is the settled rule that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon." *Silber v. James Drug Stores*, 11 A. 2d 756, 758, 124 N.J.L. 401 (1940). And it is certainly true that a state law cannot extend a federal statute. *Central Asphalt v. Industrial Bank of Utica*, 153 N.Y.S. 2d 892 (1956). See also *United States v. State of Arizona*, 214 F. 2d 389 (9th Cir. 1954).

(Rules 8(c), 12(b), 12(h) F.R.C.P.).³⁶ Certainly, the United States did not consent to be sued under such circumstances when, as is pointed out herein, the Government cannot make or join in such waiver.³⁷ As a corollary it will be noted that "It is true that where the federal statute creating the right provides a limitation on its enforcement, this limitation controls over a conflicting law." *Cassell v. Taylor*, 100 U.S. App. D.C. 153, 155, 243 F. 2d 259 (1957), citing *Young v. United States*, 87 U.S. App. D.C. 145, 184 F. 2d 587, 21 A.L.R. 2d 1458 (1950). See also: *State of Maryland v. United States*, 165 F. 2d 869 (4th Cir. 1947). All other problems aside, appellant must strain to say now that it has not prejudiced the rights of the United States by failing, under these cited cases, to argue below that the two-year statute applied to it as well as to the United States.³⁸ See also Rule 19 (failure to raise lack of party-defendant).

³⁶ This doctrine would, of course, permit silent suits to exist for alarming periods of time. In general, see *National Biscuit Company v. United States*, 156 F. Supp. 916, 927 (Ct. Cl. 1957); *Hurwitt v. Adams*, 151 A. 2d 286 (Del. 1959). See also D.C. Code (1951 ed.) § 12-205, *supra*.

³⁷ The law is generally settled that the statute of limitations is waived unless it is pleaded. Rules 8(b), 8(c), 8(d), 12(b) and 12(h), F.R.C.P. However, the Government is not bound by these rules and the law is definitely well settled that the Government cannot waive, at any stage of the proceedings in the trial or in the appellate courts, this defense. This is so because suits against the Government are forever barred when the statute runs. See: *Finn v. United States*, 123 U.S. 227 (1887); *Wallace v. United States*, 142 F. 2d 240 (2d Cir. 1944); *Lomas v. United States*, 55 F. Supp. 354 (D.C.E.D. Pa. 1957); *Jacobsen v. United States*, 160 F. Supp. 491 (D.C.E.D. Pa. 1958); 8 A.L.R. 2d 6. The applicability of Rule 6(b) could not be urged. Rule 9(f) dictates that an averment of time is material for the purpose of testing the sufficiency of a pleading.

Appellant's airy dismissal of *Lomas* and *Jacobsen* and *Simon v. United States*, 244 F. 2d 708 (5th Cir. 1957) (Br. p. 21), lacks merit. See *Simon v. United States*, 244 F. 2d 708 (5th Cir. 1957) and *Tessier v. United States*, 269 F. 2d 305 (1st Cir. 1959).

³⁸ The length of time involved in the plaintiff's action is immaterial. *Edwards v. Doctors Hospital*, 242 F. 2d 888, 890 (2d Cir. 1957). And the Government was under no legal obligation to inform the plaintiff as it did by way of motion or otherwise, that the action against Freedman's Hospital was erroneous. *Hartford Accident & Indemnity Co. v. Interstate Equipment Corp.*, 74 F. Supp. 791, 794 (D.C.N.J. 1947); *Kuhn v. Civil Aeronautics Board*, 87 U.S. App. D.C. 130, 133, 183 F. 2d 839 (1950).

In any event, Rule 20(a) expressly states that "A plaintiff . . . need not be interested in obtaining . . . all the relief demanded" and that

As has been stated, this is a "controversial" and "unsettled field of tort law" in general. *D.C. Transit System, Inc. v. Slingland*, *supra* 266 F. 2d at 470. In view of these considerations and in view of the matters set forth in this brief, it cannot be said that Congress intended to waive the immunity of the sovereign in each and every particular. However, it cannot be said that the doctrine of common liability is unsettled and that such doctrine can be eliminated from contribution cases whether the Government or a private party is involved. In the instant case, however, the Government is involved and all actions against it must be clearly and expressly within the grant of immunity. Keleket's claim, therefore must fail. *Langford v. United States*, 101 U.S. 341, 343 (1879); *United States v. Lee*, 106 U.S. 196, 227 (1882); *Dalehite v. United States*, 346 U.S. 15, at 30-32 (1953); *George Wimpey & Co. Ltd. v. British Overseas Airways Corporation*, *supra*.

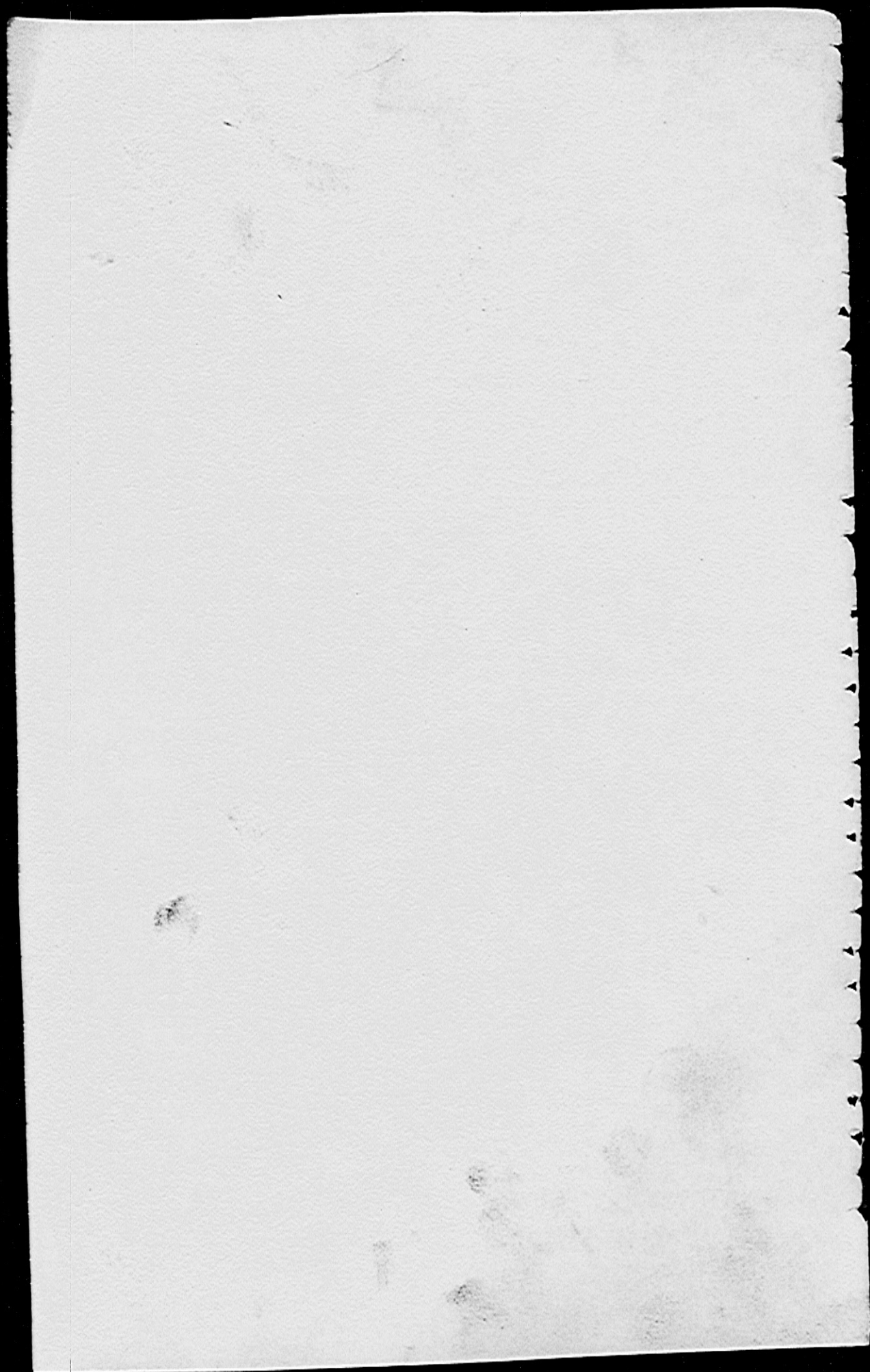
CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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 LEWIS CARROLL,
Assistant United States Attorneys.

"Judgment may be given for one * * * plaintiff(s) according to their respective rights * * * and against one or more defendants according to their respective liabilities." Hence Keleket's loss of the cross-claim does not defeat or waive its right to the power of advocacy.

APPENDIX



I. The English Statute: Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, ch. 30, Part II, 74 Law Reports, Statutes, 1934-1935, p. 345; 25 Halsbury's Statutes, Second Edn., p. 359, provides:

6(1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—

(a) Judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage;

(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child, of that person, against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and many of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;

(c) *any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought.*

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to ex-

empt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to complete indemnity.

(3) For the purposes of this section—

(a) the expressions "parent" and "child" have the same meanings as they have for the purposes of the Fatal Accidents Acts, 1846 to 1908; and

(b) the reference in this section to "the judgment first given" shall, in a case where the judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied.

(4) Nothing in this section shall—

(a) apply with respect to any tort committed before the commencement of this Part of this Act; or

(b) affect any criminal proceedings against any person in respect of any wrongful act; or

(c) render enforceable any agreement for indemnity which would not have been enforceable if this section had not been passed.

(7) This Part of this Act shall come into operation on such date as the Lord Chancellor may by order appoint. (Emphasis added.)

II. For a partial list of pertinent writings, see:

- "Actions Between to Tortfeasors—The Implied Right of Indemnity", 32 So. Calif. Law Review 293 (1959);
- "Contribution-Federal Tort Claims Act—Rights of the United States to Contribution Determined by State Law", 33 Texas Law Review 943 (1955);
- "Tort—Contribution among Tortfeasors where United States is a Party", 30 Washington Law Review 76 (1955);
- "Contribution, Indemnity, Impleader and Joinder Under the Federal Tort Claims Act", 100 University of Pennsylvania Law Review 562-575 (1952);
- "Modern Trend of the law of contribution among joint Tortfeasors", 6 Montana Law Review 34 (1945);
- "Contribution or Indemnity Among Joint Tortfeasors", 18 Notre Dame Lawyer 36 (1942-43);

- Articles on tort Actions Against Governing Bodies, 9 *Law and Contemporary Problems* 179-370 (1942);
- "Contribution and Indemnity Among Tortfeasors", 26 *Texas Law Review* 150-173 (1947);
- "Federal Liability for personal and Property Damage", 29 *New York University Law Review* 1321-1461 (1954);
- Articles on the Federal Tort Claims Act, 7 *Vanderbilt Law Review* 175-270 (1954);
- "Some aspects of Contribution and Indemnity in Tort Actions Against the United States", 9 *Federal Bar Journal* 391-410 (1948);
- "Torts—Contribution Between Joint Tortfeasors Where the Liability of One Is Fixed by a Workman's Compensation Statute", 28 *Temple Law Quarterly* 303-307 (1954);
- "Pleading and Practice: Federal Tort Claims Act: Joinder of Individuals with United States as Joint Tortfeasors", 1 *Oklahoma Law Review* 86-90 (1948);
- "Contribution: Limitation on the Liability of One Tortfeasor", 16 *Washington & Lee L. Review* 109-115 (1959);
- "Contribution among tortfeasors: A Uniform Practice", 1938 *Wisconsin Law Review* 365-397;
- "Contribution among joint Tortfeasors: A Pragmatic Criticism", 54 *Harvard Law Review* 1156 *et seq.*;
- Brief for United States, *United States v. D.C. Transit System, Inc.*, No. 14649 and 14706 (pp. 11-15).

III. For distinctions between the indemnity and contribution, see:

- St. Louis—San Francisco Ry. Co. v. United States*, 187 F. 2d 925, 927 (5th Cir. 1951) (App. Br. pp. 9, 11, 23), which rests on peculiar facts;
- Slattery v. Marra Bros.*, 186 F. 2d 134, 138 (2d Cir. 1951), cert. denied, 341 U.S. 915;
- Crawford v. Pope & Talbott, Inc.*, 206 F. 2d 784, 791-792 (3d Cir. 1953) (App. Br. p. 23);
- Pennsylvania Railroad Company v. McAllister Lighterage Line*, 137 F. Supp. 788, aff'd, 240 F. 2d 423 (2d Cir. 1957) (App. Br. 23);
- La Ferry v. Ajax Truck Rentals*, 161 F. Supp. 707, 709 (D.C. E.D. Tenn. 1958);

- Moretz v. General Electric Company*, 170 F. Supp. 698, 704 (D.C.W.D. Va. 1959);
Sabat v. Pennsylvania Railroad Co., 157 F. Supp. 325, 328 (D.C.E.D.N.Y. 1958);
Humble Oil & Refinery Co. v. Martin, 222 S.W. 2d 995, 1002 (Tex. 1949);
De La Forest v. Yandle, 340 P. 2d 52, 54 (D. Ct. App. Calif. 1959);
Donofrio v. Farr Lincoln Mercury, Inc., 149 A. 2d 611, 615, 54 N.J. Super. 500 (1959);
Globe Indemnity Co. v. Larkin, 145 P. 2d 633, 62 Cal. App. 2d 891 (1944).

IV. For contribution in general, see:

- 1 Harper and James, *The Law of Torts* (1956), § 10.1, *et seq.*, p. 692;
 2 Personal Injury, Actions, Defenses, Damages (Matthew Bender & Co., 1957), p. 621, *et seq.*;
 IV Restatement of the Law, *Torts*, Chap. 44, § 875, *et seq.*, p. 434;
 Restatement of the Law, *Restitution*, Sec. 85, Title C, p. 385;
Union Stock Yds. Co. of Omaha v. Chicago, Burlington and Quincy & R.R. Co., 196 U.S. 217 (1905);
Washington Gas Light Co. v. District of Columbia, 161 U.S. 316, 327 (1896);
Blackhawk Hotels Company v. Bonjoe, 227 F. 2d 232, 56 A.L.R. 2d 1047 (8th Cir. 1955);
Zontelli Brothers v. Northern Pacific Railway Co., 263 F. 2d 194 (8th Cir. 1959);
Val Marine Corporation v. Costas, 256 F. 2d 911 (2d Cir. 1958);
Terminal R. Ass'n of St. Louis v. United States, 182 F. 2d 149 (8th Cir. 1950);
Hassett v. Modern Maid Packers, Inc., 23 F.R.D. 661 (D.C. Md. 1959);
Cromer v. Sollitt Construction Company, 16 F.R.D. 559 (D.C. S.D. W. Va. 1954);
Di Benedictis v. United States, 103 F. Supp. 462 (D.C.W.D. Pa. 1952);

- Union Paving Co. v. Thomas*, 9 F.R.D. 612 (D.C.E.D. Pa. 1949);
Powell v. Barker, 101 S.E. 2d 113, 116-117, 96 Ga. App. 592 (1957);
McKay v. Citizens Rapid Transit Co., 59 S.E. 2d 121, 190 Va. 851 (1950);
State v. Dinwiddie, 213 S.W. 2d 127 (Mo. 1948);
Harris v. Buder, 62 N.E. 2d 131, 326 Ill. App. 471 (1945);
Drummond v. Drummond, 168 So. 428, 232 Ala. 401 (1936);
 13 Am. Jur., *Contribution*, § 1, *et seq.*;
 18 C.J.S., *Contribution*, § 1, *et seq.*

V. For cases dealing with "accrual" in the Federal Tort Claims Act, see:

- Young v. United States*, 87 U.S. App. D.C. 145, 184 F. 2d 587 (1950);
United States v. Reid, 251 F. 2d 691 (5th Cir. 1958);
United States v. Webb Trucking Co., 141 F. Supp. 573 (D.C. Del. 1956);
United States v. Wilkes-Barre Transit Corp., 143 F. Supp. 413 (D.C.M.D. Pa. 1956);
Finn v. United States, 152 F. Supp. 721 (D.C.E.D.N.Y. 1957);
United States v. Capital Transit, 108 F. Supp. 348 (D.C.D.C. 1952);
Foote v. Public Housing Com'r of United States, 107 F. Supp. 270, 274 (D.C.W.D. Mich. 1952);

VI. For some cases dealing with "accrual" in general, see:
Reynolds v. Needle, 77 U.S. App. D.C. 53, 132 F. 2d 161 (1942);

- Howard University v. Cassell*, 75 U.S. App. D.C. 75, 126 F. 2d 6 (1941), *cert. denied*, 62 S. Ct. 1046;
Cobb v. Shore, 87 U.S. App. D.C. 162, 183 F. 2d 980 (1950);
Brister & Koester Lumber Corp. v. United States, 88 U.S. App. D.C. 197, 188 F. 2d 981 (1951);
United States v. Lindsay, 346 U.S. 568 (1954);
Unexcelled Chemical Corp. v. United States, 345 U.S. 59 (1953);
District of Columbia v. Thompson, 281 U.S. 25 (1930);

James McWilliams Blue Line v. Esso Standard Oil Co., 123 F. Supp. 824 (D.C.S.D.N.Y. 1954).

VII. For a partial list of cases and citations concerning the statute of limitations in contribution cases see:

- Cassell v. Taylor*, 100 U.S. App. D.C. 153, 243 F. 2d 259 (1957);
St. Paul Fire & Marine Insurance Co. v. Cunningham, 257 F. 2d 731 (9th Cir. 1958);
St. Paul Fire & Marine Insurance Co. v. United States Lines Co., 258 F. 2d 374 (2d Cir. 1958);
D'Onofrio Construction Company v. Recon Company, 255 F. 2d 904 (1st Cir. 1958);
The Chicago, Rock Island and Pacific Railway Company v. United States, 220 F. 2d 939 (7th Cir. 1955);
Bair v. Bryant, 96 A. 2d 508 (Mun. Ct. App. D.C. 1953);
Holmes v. Capital Transit Company, 148 A. 2d 788 (Mun. Ct. App. D.C. 1959);
Northwest Airlines v. Glenn L. Martin Company, 161 F. Supp. 452 (D.C. Md. 1958);
Hidick v. Orion Shipping and Trading Co., 157 F. Supp. 477, 488 (D.C.S.D.N.Y. 1957);
New York & Porto Rico S.S. Co. of New York v. Lee's Lighters, 48 F. 2d 372, 376 (D.C.E.D.N.Y. 1930);
Wilson v. Crutcher, 56 P. 2d 416, 417, 176 Okl. 481 (1936);
Bell v. Morton, 225 Pac. 137, 139, 38 (Idaho 1924);
In re Lunt's Trust, 24 N.W. 2d 467, 237 Iowa 1097 (1946);
Cooper v. Rush, 212 S.W. 94, 138 Ark. 602 (1919);
Dennig v. Meckfessel, 261 S.W. 55, 303 Mo. 525 (1924);
Prost v. City of New York, 73 N.Y. S. 2d 811, 190 Misc. 197 (1947);
Lanser v. Baumrin, 151 N.Y. S. 2d 466 (1956);
Masheter v. Lanning, 100 P. 2d 682, 684, 151 Kan. 604 (1940);
 20 A.L.R. 2d 925;
 8 A.L.R. 2d 6 (compare § 70 and § 71), in particular see, *Lumen v. Paley*, 342 Pa. 317, 20 A. 2d 752 (1941), and *Panichella v. Pennsylvania Railroad Company*, 167 F. Supp. 345 at 352 (D.C.W.D. Pa. 1958) (To the effect that Pennsylvania follows a minority view).

VIII. For cases dealing with statutes of limitation in general, see:

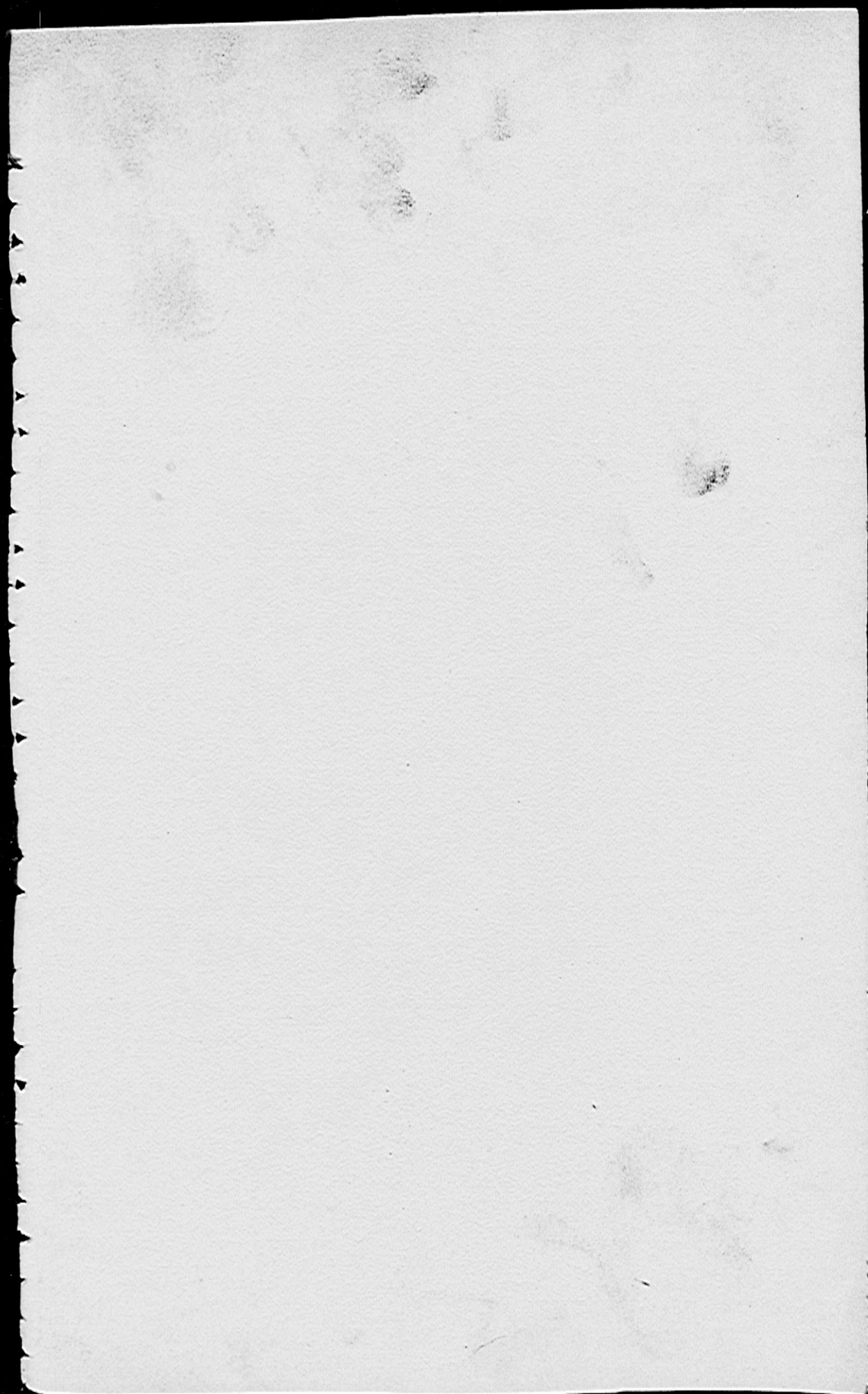
- Hudson v. Larzarus*, 95 U.S. App. D.C. 16, 217 F. 2d 344 (1954);
De Vito v. Hoffman, 91 U.S. App. D.C. 263, 199 F. 2d 468 (1952);
Kaplan v. Manhattan Life Ins. Co. of New York, 71 App. D.C. 250, 109 F. 2d 463 (1939);
Potomac Electric Power Co. v. Cardillo, 71 App. D.C. 163, 107 F. 2d 962 (1939);
Goodacre v. Shulmier, 64 App. D.C. 10, 73 F. 2d 519 (1934);
District of Columbia v. Frazer, 21 App. D.C. 154 (1903);
Gwin v. Brown, 21 App. D.C. 295 (1903);
Durant v. Murdock, 3 App. D.C. 114 (1894);

IX. MOORE'S FEDERAL PRACTICE, 2d Edition, Para's:

3.07(5)(6)(7)	13.29	18.10(3)
4.28	13.34	19.11
7.04	13.35	19.15
8.07(1)	14.03(3)	19.19
8.12	14.08	20.06
8.13	14.09	20.07(3)
12.10	14.10	38.31(2)
12.23	14.11	41.09
13.02	14.17	41.15
13.10	14.21	54.35(2)
13.14(3)	14.23(2)	54.43
13.15(2)	14.29	55.11
13.19(2)	15.15	56.58
13.21	17.09	56.26
13.25	18.05(4)	57.27
13.26	18.07(3)	82.01
13.28	18.08	

X. BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, Para's:

23	279	424
54	281	448
75	370	452
84	391-393	533
127	397-399	1193.2
163	402	



REPLY BRIEF OF APPELLANT

United States Court of Appeals
District of Columbia Circuit
NOV 18 1959
J. H. Stewart
Clerk

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,283

KELEKET X-RAY CORPORATION, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the
District of Columbia

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TABLE OF CASES

	Page
Conley v. Gibson, 355 U.S. 41 (1957)	4
Henry Fuel Co. v. Whitebread, 99 U.S. App. D.C. 9, 236 F2d 742 (1956)	3
Littlewood v. George Wimpey & Co., [1953] 2 Q.B. 501, [1953] 2 All E.R. 915, appeal dism. sub. nom. George Wimpey & Co. v. British Overseas Air- ways Corp. [1955] A.C. 169	2, 3

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REPLY BRIEF OF APPELLANT

Appellee's brief warrants response only because it constitutes an attempt to confuse and becloud the fundamental and important questions raised in this appeal.

Basically appellant demonstrated that the universality of case law in the United States supports the cross-claim which the trial court dismissed. It clearly demonstrated that the United States as a defendant has the status of a private person under the Tort Claims Act; that in the

District of Columbia a private person would be subject to the cross-claim in issue; and that the Statute of Limitations has not run against the cross-claim.

In the twenty-eight pages of brief, fourteen pages of Table of Cases, thirty-eight Footnotes and six pages of Appendix, appellee does not even make an attempt to meet the clear issues raised by appellant and does not even attempt to distinguish the four factually and legally pertinent cases cited in Section F of the argument of appellant's brief. All that appellee does is contend that the English case of *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*¹ is controlling rather than the cases from the courts of the United States. Failure to respond must be taken as indication of the overwhelming support for appellant's position.

The *Wimpey* case is not pertinent to the issues raised in the instant appeal because the Federal Tort Claims Act states that the law of the District of Columbia is controlling here rather than the Married Women's and Tort Feasors' Act of England which is the crux of the subject matter in the *Wimpey* case. Moreover the *Wimpey* case supports appellant in many respects. Both the decisions of the Court of Appeals and of the House of Lords were by divided courts. However all justices agreed that the Statute of Limitations on a claim for contribution runs from the time that the judgment is entered against the defendant seeking contribution and not from the time of the original accident. England, therefore, would permit a suit for contribution long after a two year period from the date of the accident had expired, so long as the suit was filed within two years of the judgment or disproportionate payment. This is exactly the position of appellant herein. Also the *Wimpey* case demonstrates that the

¹ *Littlewood v. George Wimpey & Co.* [1953] 2 Q.B. 501, [1953] 2 All E.R. 915, appeal dismissed sub nom. *George Wimpey & Co. v. British Overseas Airways Corp.*, [1955] A.C. 169.

English courts would reach a result contrary to that reached by this Court of Appeals in *Henry Fuel Co. v. Whitebread*, 99 U.S. App. D.C. 9, 236 F2d 742 (1956) because of the peculiar wording of their Statute of Contribution.² Actually in Footnote 5 appellee cites *Wimpey* inaccurately in support of a contrary proposition.

In realization of the futility of its position on the question of whether the United States is subject to cross-claim for indemnity or contribution, appellee attempts to argue the merits of the case and the lack of factual support therefor. This it cannot do because the record does not contain the evidence or the contracts from which a proper determination with respect to the relationship of the parties or their relative rights and obligations could be made and the attempt to raise such issues is not an adequate substitute for coping with the important and fundamental questions raised in the appeal.

There is no merit to the appellee's claim that the cross-claim fails to state a cause of action.³ The cross-claim sets forth a claim in the alternative for contribution or indemnity; the former based on the contributing negligence of the United States to the plaintiff and the latter based on the failure of the United States to take measures to avoid the accident. There is no way to decide now whether the evidence will sustain either proposition, however, appellant is entitled to the opportunity to advance its proof.

The cross-claim satisfies the requirements of Rule 8 (a) of the Federal Rules of Civil Procedure, which provides

² It is interesting to note that there was considerable sentiment among the majority in *Wimpey* for amendment of the statute to permit the allowance of contribution under the circumstances presented.

³ In fact the United States and the District Court did not rely upon this ground below, and the appellee's perfunctory briefing on this point evinces its lack of conviction.

for "a short and plain statement of the claim," and Rule 13 (g) which provides that:

Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

In appraising the sufficiency of the cross-claim, the United States does not heed the accepted rule "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Contrary to the contentions of the United States, the Supreme Court has said in *Conley v. Gibson*, *supra*, at 47-48:

... all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

The cross-claim of the appellant in this case obviously satisfies the requirements of "notice pleading."

Appellee makes several other arguments which are equally unsupported and unrelated to the primary question in the appeal. Appellee asserts that the right to contribution is unsettled in this jurisdiction, thereby ignoring all of the recent cases from this Court which clearly establish contribution as an independent right. Appellee claims that there is no case which permits contribution against the United States when two different Statutes of Limitations are involved. It cites no case in support of its claim that contribution should not be allowed and disregards the

cases cited in Section F of the argument in appellant's brief. Appellee contends that the United States would not be subject to a cross-claim filed against it in an action pending in a state court and asserts further that if such a cross-claim were filed the case would not warrant removal to a United States District Court. The fact that state courts do not have jurisdiction in Federal Tort Claims Act matters is not relevant here. Equally irrelevant are the cases involving attempts to obtain contribution or indemnity from employers who are protected by the Workmen's Compensation exclusive remedy statute and the cases involving the requirement of giving the District of Columbia notice within six months after an accident occurs before suit can be maintained against it. Discussion of these unrelated matters is not helpful to a proper consideration of the points raised in this appeal. Similarly the long list of citations for the general propositions set forth in the Appendix are not helpful here.

At the writing of this reply brief appellee has not yet filed its printed brief and appellant has opposed the third request for extension of time. Appellant made no opposition to the initial request for a thirty day extension, however, this Court's order provided that no further extensions would be granted except for extraordinary cause shown and appellee, in appellant's view, has failed to make a showing of even ordinary cause. As the time covered by the original extension was about to expire it was apparent that the United States had not moved with dispatch and was not prepared to file its brief. It requested an additional extension of time and on the last day of that period filed what purported to be a typewritten copy of its finished brief. It was required by virtue of Rule 18 (d) to file at that time a certificate to the effect that the typewritten brief had been placed in the hands of the printer and that no further changes would be made. It is apparent from its latest motion for extension of time that the attorneys were still working on the evaluation of the

citations contained in the brief contrary to the certificate which had been filed. When this record is considered in the light of the fact that the brief contains extensive citation and discussion of every conceivable phase of law except that which is presented for consideration, the conclusion is warranted that appellee's brief is not calculated to promote an orderly and just disposition of this controversy.

Respectfully submitted,

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